Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States
October Term, 1994

ANGEL YUH WILLIAMSON, M.D.,
PENSACOLA DIAGNOSTIC & BREAST CLINIC, P.A.,

Petitioners,

v.

SACRED HEART HOSPITAL OF PENSACOLA,
BAPTIST HOSPITAL, INC.,
PENSACOLA RADIOLOGY CONSULTANTS, P.A.,
ALBERT A. POST, M.D. and
KEITH T. SHEARLOCK, M.D.,
HEALTH FIRST NETWORK, INC.,

Respondents.

Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. In determining whether a plaintiff's antitrust conspiracy claim should survive summary judgment, may the court weigh competing evidence on the defendants' motives?

II. Whether a plaintiff whose profits have increased since filing suit, as a matter of law, has no standing to file an action for damages under the antitrust laws.

INTERESTED PARTIES

The following persons and entities have or may have an interest in the outcome of this case:

Baptist Hospital, Inc

Beggs & Lane
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Pensacola Diagnostic & Breast Clinic, P.A.

Pensacola Radiology Consultants, P.A.

Albert A. Post, M.D.

Sacred Heart Hospital of Pensacola

Keith T. Shearlock, M.D.

Angel Yuh Williamson, M.D.

Michael Williamson, M.D.

STATEMENT OF PARENT, SUBSIDIARY AND AFFILIATE CORPORATIONS

Pursuant to Supreme Court Rule 29.1, Pensacola Diagnostic Center and Breast Clinic, P.A. has no parent, subsidiary, or affiliated corporations.

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OPINIONS BELOW

Petitioners seek review of the unreported opinion of the Eleventh Circuit Court of Appeals, *Williamson v. Sacred Heart Hospital of Pensacola*, 41 F.3d 667 (11th Cir. 1994). That opinion appears in the Appendix to this petition at A3.[1] The United States District Court for the Northern District of Florida issued two separate opinions, one granting and one denying the motions for summary judgment. The two opinions, neither of which were reported, appear in the Appendix at A16 and A54.

JURISDICTIONAL GROUNDS

Pursuant to 28 U.S.C. § 1254(1), petitioners Angel Yuh Williamson, M.D. and Pensacola Diagnostic Center and Breast Clinic, P.A. (collectively "Dr. Williamson") file this Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeals seeking review of the court's November 18, 1994 decision affirming the district court's grant of summary judgment to the defendants on Dr. Williamson's Sherman Act and state law claims. Dr. Williamson's timely petition for rehearing was denied on January 9, 1995 and the Eleventh Circuit's mandate issued on January 23, 1995.

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[1] Citations to the attached Appendix are designated as "A___."

RELEVANT STATUTES

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal.

Section 1 of the Sherman Antitrust Act, 15 U.S.C. §1.

INTRODUCTION

This antitrust case presents important issues regarding proof of conspiracy and standing that have troubled and divided the lower courts. Dr. Williamson opened a diagnostic center and breast clinic that gave Pensacola women and their physicians new options in the early diagnosis and treatment of breast cancer. In this action brought under the Sherman Antitrust Act, Dr. Williamson and her clinic allege that her biggest competitors entered into a conspiracy to make it difficult, if not impossible, for Dr. Williamson's clinic, and other independent clinics like hers, to compete against hospital-based radiology departments.

The defendants filed the usual motions for summary judgment, contending that Dr. Williamson had not presented sufficient evidence of conspiracy to reach the jury. In two lengthy and conflicting orders, the district court first denied (A16) and then granted summary judgment (A54). The Eleventh Circuit affirmed the second order (A3).

This case presents the Court with an opportunity to resolve conflicting decisions among the circuits on the quantum

of evidence necessary to survive summary judgment in antitrust conspiracy claims based on circumstantial evidence. Dr. Williamson presented competent substantial evidence below that the defendants conspired to attack her referral base and to deny her access to hospital facilities. Defendants concede that Dr. Williamson is highly qualified in her specialty. The evidence suggests that, acting alone, each defendant would have been eager to associate with Dr. Williamson. However, acting as a group the defendants could and did attack her practice by keeping her out of Pensacola's largest HMO. Defendants also denied her access to the most significant hospital facilities in Pensacola (defendants Sacred Heart and Baptist Hospitals), which prevented Dr. Williamson from rendering complete care to her patients. Finally, the defendants attacked her referral base by entering into highly improper and possibly illegal agreements with Dr. Williamson's core group of referral physicians. These agreements caused her new referrals from these physicians to drop drastically.

In response, the defendants submitted some evidence that their actions were consistent with unilateral action. Instead of acknowledging that this evidence created a factual issue for the jury, the Eleventh Circuit weighed the competing evidence on the defendants motives and ruled as a matter of law that the defendants' actions were consistent with their economic interests and that, therefore, summary judgment was required. The Eleventh Circuit's decision, like similar decisions in the Fourth, Eighth and Tenth Circuits, are in conflict with decisions of other circuits that forbid the weighing of conflicting evidence regarding the defendants' motives.

The Eleventh Circuit also ruled that Dr. Williamson had no standing to assert her antitrust claims. Again, the Eleventh

Circuit resolved factual issues that were rightfully for the jury. Dr. Williamson had evidence that the defendants' conspiracy was enormously successful. By attacking her referral base, the defendants quickly caught and then surpassed the success of Dr. Williamson's independent clinic. The impact on the market was dramatic. Despite the increasing popularity of independent radiology clinics around the country, not one such clinic opened in Pensacola after the conspiracy began. In fact, twenty-one new radiologists have come to Pensacola since Dr. Williamson opened her doors. All twenty-one have affiliated with hospital-based radiology groups. None joined an independent clinic like Dr. Williamson's. Dr. Williamson presented this evidence of injury to the market along with "dramatic" statistical evidence of the diversion of referrals from her clinic.

Despite this evidence of injury to the market and to Dr. Williamson's clinic, the Eleventh Circuit ruled as a matter of law that Dr. Williamson had no standing to bring an antitrust action because her clinic was profitable. This decision is in conflict with several other circuits and should be reversed.

The Eleventh Circuit's rulings on proof of conspiracy and standing threaten to destroy the effectiveness of private causes of action as a means for enforcing antitrust policy in the United States. This Court should grant certiorari to consider these important issues.

STATEMENT OF THE CASE AND FACTS

Dr. Williamson is a Pensacola radiologist, board certified in both diagnostic radiology and nuclear medicine (App. III at 1-2).[2] Defendants concede that Dr. Williamson is highly qualified in her specialty.

The New Breast Care--Dr. Williamson Opens Her Clinic

Dr. Williamson completed her residency and moved with her husband to Pensacola in 1983. Dr. Williamson joined an independent radiologist and soon began to focus her practice on the care and treatment of breast disease (App. II-34 at 31-34).[3] At about the same time Dr. Williamson began to practice, certain radiologists were beginning to promote a fundamental change in the traditional approach to breast care. Under the traditional approach, a woman would see a primary care physician such as a family practitioner or gynecologist who would refer the woman to a radiologist for a mammogram. At her scheduled radiology appointment, the patient typically would not see the radiologist and would receive no consultation of any kind. The radiologist would later send a report to the primary care physician. The patient would then await another

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[2] Much of Dr. Williamson's evidence is in the record in a three-volume appendix which appears in Volumes 11-309 and 12-311 of the record. References to these documents will be by Appendix volume number, tab number and page number.

[3] Breast cancer is one of the leading killers of American women. "Cancer Statistics, 1991," CA-A Cancer Journal for Clinicians, Vol. 41, No. 1 (January/February 1991) at 19-20. One in ten American women will develop breast cancer sometime in her life. In 1990 alone, some 44,000 women died in this country from the disease. Id. Early detection is critical. With early detection, over 90% of all breast cancers can be cured. Id.

appointment with her primary care physician to discuss the radiology report. More often than not, the primary care physician was not a specialist in the diagnosis and care of breast disease. If necessary, the primary care physician would then refer the patient to a surgeon who would do the biopsy necessary to complete the diagnosis. Thus, the patient would endure a minimum of four appointments and never be seen by a specialist in breast disease. These four appointments might take weeks or months to complete even though time is of the essence and the patient's anxiety level is at its highest (R. 15-354 at 2-3; App. I-4 at ¶¶ 5-10; App. I-13 at ¶¶ 19-20; App. I-8 at ¶22).

Dissatisfied with this lack of comprehensive and specialized treatment, a number of radiologists began to develop an alternative, more comprehensive, treatment of the breast patient. Upon self-referral or referral from a primary care physician, these radiologists would conduct patient histories and physical exams and perform the necessary diagnostic tests all in one visit. If referral to a surgeon is necessary, the referral could be made that day. Afterward, these radiologists remain in active consultation with the surgeon and coordinate the care received by the patient during her surgery and recovery (R. 15-354 at 2-3); App. I-8 at ¶23; App. I-13 at ¶20). Defendants do not dispute the many advantages of this new comprehensive approach.

When Dr. Williamson arrived in Pensacola, no radiologist offered comprehensive breast care services to the women of Pensacola (App. I-12 at ¶¶ 6-9; App. III at 9, 334-37, 646-47, 842-44). Accordingly, Dr. Williamson decided to open a clinic to provide this much needed service to this under-served market.

Based on conversations with several ob/gyns who would likely be her referral base, Dr. Williamson feared that the defendant hospitals would be hostile to her plans for a clinic. (App. II-34 at 134-40.) Dr. Williamson decided to seek the advice of Dr. Whitcomb, Sacred Heart's medical director. Dr. Whitcomb's advice took the form of a warning: "If you open, we are going to close you one way or the other. We are going to blackball you." (App. II-34 at 134).

Dr. Williamson ignored Sacred Heart's warning and opened her clinic in May, 1984. *Id.* at 39; App. III at 3, 4. The clinic was an immediate success. Dr. Williamson was able to establish referral relationships with a number of primary care physicians, (App. II-34 at 165-74; App. I-9 at ¶¶5-6; App. I-1 at ¶34, and Figures 1, 3, 4, 6, 7 and 9).

The Conspiracy is Formed

Sacred Heart made good on its threat. Shortly after Dr. Williamson's clinic was opened, the defendants began their conspiracy to eliminate Dr. Williamson's practice. The conspiracy was accomplished by a two-pronged attack on the clinic's lifeline, its referral base. The clinic depended on two major sources for referrals, referrals from physicians and self-referrals by the patients themselves (App. I-1 at ¶¶ 34-39). To attack Dr. Williamson's base of self-referrals, the defendants acted to deny her full staff privileges at Sacred Heart and Baptist (R. 12-311 at 18-42; 92-119). This denial had the effect of preventing Dr. Williamson from rendering complete care to

her patients.[4] The denial had the equally harmful effect of preventing her from participating in a number of managed care programs including the Blue Cross/Blue Shield HMO, known as Health Options (App. II-34, 78-79, 85, 94-95, 216-18, 1204, 1478-80).

Dr. Williamson's physician referral base was attacked directly by both Baptist and Sacred Heart through contracts between the hospitals and the referring physicians that had the effect of diverting referrals away from Dr. Williamson the hospitals (R. 12-311 at 49-64).

While attacking her referral base, Sacred Heart and Baptist responded to Dr. Williamson's new style of care by opening their own women's centers. Despite Dr. Williamson's two-year head start and high level of service, both of these institutions quickly overtook Dr. Williamson in the market and soon were performing many more breast exams than Dr. Williamson (App. I-1 at ¶¶36-37).

The Conspiracy Eliminates Competition From Independent Radiologists

The effect of the conspiracy has been to stifle competition from independent radiologists. Between the time Dr. Williamson opened her clinic and the close of discovery, twenty-one new radiologists had come to Pensacola. In an era when independent clinics are otherwise booming, and despite low barriers to entry, not one of the radiologists opened or

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[4] For example, Dr. williamson often had patients that needed biopsies performed through a needle-placement procedure. Sacred Heart would not accept Dr. Williamson's needle placement patients in part because she did not have staff privileges. (R. 12-311 at 64-70)

joined an independent radiology clinic. All joined traditional hospital-based practices, most with the defendants (R. 12-311 at 129-39).

Dr. Williamson Files Suit

Finding herself cut off from staff privileges at Scared Heart and Baptist and from membership in Pensacola's largest HMO and watching her established referral base disappear, Dr. Williamson brought a four-count complaint against the defendants. Dr. Williamson sued the two hospitals who denied her staff privileges, Sacred Heart Hospital of Pensacola and Baptist Hospital, Inc. She also sued Pensacola Radiology Consultants, P.A., ("PRC") the radiology group that operated Sacred Heart's competing breast clinic and its chairman, Dr. Albert A. Post. Finally, she sued Health First Network, Inc., the group of physicians that denied Dr. Williamson access to the Pensacola Blue Cross/Blue Shield HMO, and Health First's president, Dr. Keith T. Shearlock. Dr. Williamson alleged that all of the defendants engaged in a conspiracy in violation the Sherman Act and that Sacred Heart along with PRC and Dr. Post tortiously interfered with her business relationships with referring physicians and her patients (R. 1-2).[5]

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[5] Counts I-III are brought under Section 1 of the Sherman Act. Count I attacks the actions Sacred Heart and PRC took to frustrate Dr. Williamson's ability to compete (R. 1-2 at ¶55). Count II addresses just those actions taken by Baptist against Dr. Williamson (R. 1-2 at ¶ 64). Count III alleges a conspiracy among all the defendants. Count IV is brought under state law. Dr. Williamson alleges that Sacred Heart, PRC and Dr. Post tortiously interfered with Dr. Williamson's established business relationships with her patients and referral physicians (R. 1-2 at ¶73).

Proof of Conspiracy

Dr. Williamson proved the conspiracy below by showing that the defendants undertook parallel actions that made no economic sense in the absence of a conspiracy. Sacred Heart and Baptist each denied Dr. Williamson full staff privileges and Health First denied Dr. Williamson membership in the local Blue Cross/Blue Shield HMO despite substantial evidence that each had strong financial incentives to deal with her in the absence of a conspiracy.[6] This evidence is summarized very briefly below.[7]

Sacred Heart. Dr. Williamson first applied for staff privileges at Sacred Heart in the Department of Radiology. Sacred Heart had a substantial incentive to grant her application. Dr. Williamson acts as the primary care physician for thousands of Pensacola women. Like any primary care physician, she performs the same gatekeeper functions in determining when referrals to specialists are needed. Although she does not generally refer patients directly for admission to any hospital, she refers numerous patients to physicians who have staff privileges at these hospitals. Thus, her referral decisions will have a very substantial impact on Sacred Heart or Baptist's admissions. By bringing Dr. Williamson into their circle of physicians, both Sacred Heart and Baptist could maximize their chances that her patients would be admitted to

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[6] There is no dispute that the defendants had an opportunity to conspire. See A45.

[7] The record on appeal is extremely voluminous in this case, containing thousands of documents. The parties' briefs on the issues of summary judgment totalled over 500 pages. Dr. Williamson's discussion of the facts and issues in this brief is necessarily compressed.

their respective hospitals (R. 12-311 at 94-95; App. I-1 at 16-19; App. I-14 at 5-15).

Despite this incentive, Sacred Heart argued that it could not approve of staff privileges in the Department of Radiology because it had an exclusive contract with PRC. There was evidence that Sacred Heart and PRC's reliance on the exclusive contract in radiology was a pretext. The contract did not require the hospital to reject Dr. Williamson's request for limited privileges.[8] Evidence exists that she was qualified to do everything she requested and that none of her requests were within the exclusivity provisions of the contract. As the district court noted, Sacred Heart accommodated other physicians in spite of the exclusive contract (A29; R. 16-354 at 81-83).

Refused privileges in radiology, Dr. Williamson applied for privileges in the department of internal medicine. There is substantial evidence that the hospitals' justifications for denying her privileges were a pretext. To begin with, there was evidence that Dr. Williamson was superbly qualified and had the training to satisfy the minimal requirements of privileges in internal medicine (R. 12-311 at 22-24; 27-31). The Credentials Committee agreed and suggested that the hospital's refusal to grant her privileges was anticompetitive. *Id.*

When it became apparent that Dr. Williamson's application for privileges in internal medicine might succeed, the hospital administration *changed the medical staff by-laws* in a manner completely outside the usual amendment process. This change rendered her technically unqualified. *Id.* at 22-28.

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[8] Dr. Williamson specifically requested limited privileges that would not interfere in any way with the procedures reserved to PRC.

Later, at the "fair hearing" mandated by the by-laws, the hospital refused to accept Dr. Williamson's evidence that she was qualified and that her application would be in the best interest of the hospital. *Id.* at 31-32.

In addition to denying Dr. Williamson staff privileges, Sacred Heart barred certain of Dr. Williamson's needle placement patients from treatment at the hospital.[9] One of Sacred Hearts own physicians described the hospital's justifications as "silly." *Id.* at 69.

None of those actions are explainable if one accepts Dr. Williamson's proof that Sacred Heart, acting unilaterally, had every incentive to deal with her.

Baptist. Baptist conceded that it had the same economic incentive to grant Dr. Williamson privileges. Yet, Baptist delayed sending Dr. Williamson an application for privileges for six months while it drafted a contract to ensure her exclusion. When Dr. Williamson finally pried an application form from Baptist, Baptist denied privileges to Dr. Williamson based on a so-called exclusive contract whose contours even Baptist concedes were vague and confusing.[10] Curiously, Baptist invoked the exclusive contract despite the Baptist radiology

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[9] Occasionally, Dr. Williamson's examination will reveal a lesion too small to be found easily by the surgeon. The solution is to insert a Kopan's needle which contains a very thin hook-wire into the breast. After properly positioning the needle so that it isolates the suspicious area, the radiologist removes the needle, leaving the hook-wire attached to or very near the lesion. The surgeon need only follow the wire to find the lesion (App. I-8 at ¶ 18; I-13 at ¶ 13.

[10] Baptist administrators, and even members of the radiology group, did not know that the contract was exclusive.

group's lack of objection to her privileges. In other words, Baptist acted to tie its own hands by a restrictive contract in the absence of any request from the radiology group for additional exclusivity. *Id.* at 34-42. Dr. Williamson's treatment at the hands of Baptist was unusual. The evidence showed that other physicians participated in various aspects of radiology at Baptist despite the "exclusive contract." *Id.* at 36. Finally, when Baptist finally granted provisional privileges to Dr. Williamson, it indicated that she would never graduate to full privileges based on another "rule" whose origin was uncertain. Without full privileges, Dr. Williamson remained barred from Pensacola's largest HMO. *Id.* at 39-42.

Health First. As to defendant Health First, Dr. Williamson showed through internal Health First documents that Health First was concerned about the high cost of radiology referrals and laboratory services. Dr. Williamson offered to solve that problem by offering her services at a lower cost then currently being paid by the HMO. Despite its obvious economic incentive to admit Dr. Williamson, Health First denied her application for reasons that make no economic sense in the absence of a conspiracy. *Id.* at 42-44.

Direct Attack on Physician Referrals

Dr. Williamson also had evidence that defendants entered into improper and perhaps illegal contracts to divert referrals from her clinic to Sacred Heart, PRC and Baptist. Sacred Heart conceded that it was improper to enter into contracts to divert referrals for any reason other than quality of care (App. II-13 at 36-37). Yet, Dr. Williamson had substantial evidence that such diversions occurred. One physician admitted the diversion (App. II-13 at 36-37, 43). Others testified they

were pressured by the hospital to divert referrals. Contracts were placed into evidence unambiguously requiring a diversion of referrals (App. III at 707 ¶ 4(i); 706 ¶ 4E).[11]

Sacred Heart and PRC kept careful records of physicians referrals to competitors. Sacred Heart policed referrals by direct visits to the referring physician's office (App. I-10). Another Sacred Heart physician gave a sworn statement shortly before his death in which he testified that physicians who did not comply with the hospital's wishes on referrals were threatened with being blackballed (R. 12-311 at 60-61).

Statistical evidence proves that the diversion was extremely successful. Dr. Williamson had what the district court called "dramatic" evidence of a decrease in new referrals from Sacred Heart physicians (A32). Referrals from Baptist physicians under contract with Baptist showed virtually no growth while Baptist physicians not under contract showed substantial numbers of new referrals to Dr. Williamson.

None of the physicians had convincing explanations for their decision to dramatically reduce their new referrals to Dr. Williamson. None had any concerns over her quality of care. Indeed, most continued to send their friends and relatives to her while their "ordinary" patients went to Sacred Heart (R. 12-311 at 49-63.

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[11] Sacred Heart had very substantial leverage in these contracts. For example, in one contract, any breach of any covenant in the contract resulted in the physician's loss of privileges to practice at Sacred Heart (App. III at 685-689).

Summary Judgment

The defendants moved for summary judgment, alleging that Dr. Williamson had no evidence to support her conspiracy charges (R. 10-291; 10-293; 10-296). After reviewing the voluminous submissions of the parties, the district court *denied summary judgment* as to every defendant save PRC and Dr. Post (A16). In a detailed 43-page order, the court reached the conclusion that Dr. Williamson had both direct and circumstantial evidence supporting the existence of the conspiracy. As to Dr. Post and PRC, the court concluded that Dr. Williamson had some evidence of conspiracy, but not enough to get her case before a jury (A41-44).

The remaining defendants filed motions for rehearing, rearguing the same facts already presented to the court (R. 14-333, 337, 339). The court granted rehearing and this time entered summary judgment as to all of the defendants (A54). Curiously, the court provided no explanation for the reversal of its previous decision. In the second order, after analysis of the same set of facts, the court held that Dr. Williamson had not demonstrated a material factual dispute on the issue of conspiracy. *Id.*

The Eleventh Circuit affirmed summary judgment as to all of the defendants. The opinion largely adopts the reasoning of the district court's second opinion (A3).

Basis for Jurisdiction Below

This district court had jurisdiction pursuant to 28 U.S.C. §1331. The Eleventh Circuit had jurisdiction pursuant to 28 U.S.C. §1291.

WHY THE WRIT SHOULD BE GRANTED

The Eleventh Circuit's opinion is the latest example of a conflict brewing among the circuits over the analysis of antitrust conspiracy claims on summary judgment. Dr. Williamson presented competent evidence on each element necessary for proof of conspiracy. Yet, the Eleventh Circuit misread this Court's *Matsushita*[12] decision to require Dr. Williamson not only to create a fact issue on each element but actually to prevail on one or more of these elements to survive summary judgment. In doing so the court intruded on the jury's fact finding province. Once Dr. Williamson submitted evidence supporting a reasonable inference of conspiracy, it was the jury's function to weigh the evidence and choose between the inferences drawn by Dr. Williamson and the defendants.

The opinion below also misapplies this Court's rulings on standing in antitrust actions. The Eleventh Circuit ruled as a matter of law that the profit made by Dr. Williamson and her clinic eliminates their standing to sue under the antitrust laws. In doing so, the court overlooked substantial evidence that the defendants' conduct severely impacted the market and damaged Dr. Williamson. By ruling against Dr. Williamson as a matter

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[12] *Matsushita Electric Industrial Company v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

of law, the court created a conflict with several other circuit courts of appeals.

Granting certiorari in this case will permit resolution of these conflicts and ensure that private damage causes of action remain a viable remedy to physicians aggrieved by anticompetitive behavior. Certiorari will also permit this court to illustrate the appropriate scope of the antitrust laws in disputes between physicians and hospitals. The decision below is evidence of lingering hostility in the lower courts, correct in many cases, but misplaced in this case, towards such lawsuits. This Court should intercede, as it has twice before in staff privilege actions, to confirm that the antitrust laws do not impose higher standards of proof on medical professionals who are the victims of anticompetitive conduct.

This Court Should Grant Certiorari To Resolve Conflict Among the Circuits In The Analysis of Conspiracy Claims on Summary Judgment

This Court has recognized that "[o]nly rarely will there be direct evidence of an express agreement" in conspiracy cases. *Local Number 189 Amalgamated Meat Cutters v. Jewel Tea Company*, 381 U.S. 676, 720 (1965). Thus, Dr. Williamson, like most antitrust plaintiffs, relied on circumstantial evidence. Such evidence is admissible and often dispositive. *See* cases collected in ABA Antitrust Section, Antitrust Law Developments (3d Edition 1992) at 4 n.24.

The first step in proving a conspiracy is to show that the defendants have engaged in parallel conduct. Here Sacred Heart, Baptist, and Health First acted to exclude Dr Williamson from their respected institutions. Next, plaintiffs must show

some plus factor indicating that defendants' parallel conduct resulted from a conspiracy. To do this plaintiff must show that defendants had a non-legitimate motive for entering into a conspiracy. That is, plaintiffs must show that, by acting together, the defendants can achieve an economically beneficial result that would be difficult or impossible to achieve acting separately. *Matsushita*, 475 U.S. at 587-88; *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1232 (3d Cir.), *cert. denied*, 114 S. Ct. 554 (1993).

Finally, Plaintiffs must present evidence that tends to exclude the possibility that defendants acted unilaterally. Most commonly this is shown by evidence that defendants acted contrary to their economic interest. *Matsushita*, 475 U.S. at 587-88. Alternatively, plaintiffs may show that defendants' justifications for their conduct were pretextual. *See Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Company*, 472 U.S. 284, 296 n.7 (1985); *Alvord-Polk, Inc. v. F. Schumaker & Co.*, 37 F.3d 996, 1012 (3d Cir. 1994); *Big Apple BMW v. BMW of North America*, 974 F.2d 1358 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1262 (1993). Other factors, such as proof of an opportunity to conspire are helpful but not necessarily dispositive. *See* cases collected in ABA Antitrust Section, Antitrust Law Developments (3d ed. 1992) at 7 n.47.

Dr. Williamson created fact issues on all of these points. There is no dispute that the defendants met frequently and had an opportunity to conspire (A45). There is also a plausible motive to conspire. By acting together, the two hospitals, which comprised nearly 70% of the market, could severely inhibit her referrals by keeping her out of several managed care organizations and by directly attacking her physician referral base. As discussed below, had they been acting individually,

the hospitals each had a substantial economic incentive to form a relationship with Dr. Williamson (R. 12-311 at 91-97).

Dr. Williamson also had substantial evidence that the justifications asserted by the defendants were purely pretextual. At Sacred Heart, when Dr. Williamson applied for privileges in radiology, the hospital asserted its exclusive contract with PRC even though the contract did not apply to her request. When she switched her application to the department of internal medicine, the hospital changed its bylaws to keep her out. The justifications for barring her needle placements patients from the hospital were described as "silly" by one Sacred Heart physician. At Baptist her application was inordinately delayed. Baptist then denied Dr. Williamson staff privileges in radiology for three years even though there was no written exclusive contract with its radiology department and in the absence of any objection by its radiologists. Health First rejected Dr. Williamson's application despite the fact that she offered high quality services at low prices at the same time Health First's internal documents were blaming its lack of profitability on the high cost of referral care, including radiology. Instead of finding a way to benefit from her high quality services and lower prices, Health First did everything it could to keep her out. Viewing this evidence of pretext, the district court in both orders concluded that there were fact issues on whether the defendants were acting in the best interest of patient care (A46, 120).

The Eleventh Circuit ignored this evidence and focused on one element: whether the defendants had an economic incentive to deal with Dr. Williamson. Dr. Williamson submitted plausible evidence that they did. By establishing a relationship with Dr. Williamson, each hospital stood a

significant chance that her patients would choose that hospital for other hospital services. To deny her privileges would force Dr. Williamson to form her referral relationships with physicians at the competing hospital. There was no downside to granting her privileges. Even though Dr. Williamson was a competitor, granting her privileges would not concede a single patient to her in the competition between the hospitals' breast clinic and Dr. Williamson's clinic.

Indeed, at one point in the litigation Baptist conceded that granting Dr. Williamson's staff privilege application was in the hospital's economic interest:

> By granting her these privileges, Baptist could achieve the economic benefit of patient referrals from Dr. Williamson while both preventing the hospital from being exposed to unnecessary liability and maintaining its standard of quality health care.

R.10-291 at 31.[13]

On summary judgment, Sacred Heart and Baptist argued that the hospitals had no incentive to accommodate her because they operated radiology clinics in competition with Dr. Williamson. The Eleventh Circuit reached the simplistic conclusion that granting her privileges would be providing aid to a competitor. This conclusion ignores the fact that denial of privileges (without the assurance of cooperation of the other

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[13] Thus, the district court concluded in its first order that genuine issues of fact existed with respect to the defendants' incentive to deal with Dr. Williamson (A46). Other courts have reached similar conclusions. *See Weiss v. York Hospital*, 745 F.2d 786, 789 (3d Cir. 1984), *cert. denied*, 470 U.S. 1060 (1985).

hospital) would simply drive Dr. Williamson and her patients to the competing hospital. Regardless of the competition she provided to the hospital's radiology group, the hospitals still had a strong economic interest in capturing her patients.

Clearly, as the district court noted in its first order, the issue of the hospitals' incentive to deal with Dr. Williamson was a factual issue that should have been presented to the jury. However, the Eleventh Circuit's opinion below misreads *Matsushita* to require Dr. Williamson to win her case before it is even submitted to the jury. The Eleventh Circuit resolved the issue of the defendants' motive to conspire against Dr. Williamson by weighing the evidence and ruling that there was no economic incentive for the hospital to deal with her. According to the Eleventh Circuit, the fact that the defendants submitted a plausible argument supporting their claim that they acted unilaterally ended the analysis.

Unfortunately, the Eleventh Circuit is not the only circuit to misread *Matsushita* in this way. The Fourth, Eighth and Tenth Circuits have also granted summary judgments to defendants after weighing the parties' conflicting evidence on the defendants' motives. *Oksanen v. Page Memorial Hosp.*, 945 F.2d 696 (4th Dir. 1991) (en banc), *cert. denied*, 502 U.S. 1074 (1992); *Lovett v. General Motors Corp.*, 998 F.2d 575 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 1058 (1994); *Gibson v. Greater Park City Co.*, 818 F.2d 722 (10th Cir. 1987).

For example, in *Lovett*, the plaintiff was a GM dealer with a deserved reputation as a price cutter. Plaintiff's allocation of cars from GM was significantly curtailed after GM received complaints from other local dealers. Plaintiff had significant evidence of conspiracy yet suffered summary

judgment after the circuit court weighed plaintiff's evidence against GM's evidence that it was acting in its economic interest. Although plaintiffs had evidence that GM's actions were not in its interests, the fact that GM submitted a plausible explanation was dispositive. 998 F.2d at 580.

In *Gibson*, the Tenth Circuit conducted a similar analysis and reached a similar conclusion, rejecting plaintiff's conspiracy claims because the evidence was ambiguous. 818 F.2d at 724-25. In *Oksanen*, the court accepted the defendants' justifications at face value rejecting the plaintiff's evidence to the contrary over the objections of the dissenting judges who were concerned that the court had imposed too high a burden on antitrust plaintiffs facing summary judgment. 945 F.2d at 706-08; 714-16.

These cases all misread *Matsushita's* requirement that plaintiff present evidence that tends to exclude the possibility of unilateral action. According to those decisions, if the defendants and plaintiffs each submit evidence on the defendant's motives, the evidence is "ambiguous" and cannot exclude the possibility of unilateral action.

These cases conflict directly with recent decisions out of the Third and Ninth Circuits where the courts refused to weigh between competing inferences. In these cases, so long as the plaintiff has evidence that calls into question the justifications forwarded by the defendants, the job of weighing this evidence remains with the jury.[14] As the Ninth Circuit explained:

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[14] *See Petruzzi's IGA Supermarket, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1231 (3d Cir.) (defendant not entitled to summary judgment merely by forwarding an economic theory justifying its conduct), *cert. denied*, 114 S.Ct. 554 (1993); *Big Apple BMW v. BMW of North America*, 974 F.2d

> Nor do we think that *Matsushita* and *Monsanto* can be read as authorizing a court to award summary judgment to antitrust defendants whenever the evidence is plausibly consistent with both inferences of conspiracy and inferences of innocent conduct. Such an approach would imply that circumstantial evidence alone would rarely be sufficient to withstand summary judgment in an antitrust conspiracy case. After all, circumstantial evidence is nearly always evidence that is plausibly consistent with competing inferences.

Arizona v. Standard Oil Co. of California, 906 F.2d 432, 439 (9th Cir. 1990), *cert. denied*, 500 U.S. 959 (1991).

The analysis of *Petruzzi*, *Big Apple*, and *Standard Oil* appears to conform with this court's recent decision in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 112 S.Ct. 2072 (1992). *Kodak* emphasizes that *Matsushita* does not introduce a special burden on plaintiffs facing summary judgment in antitrust cases. 112 S. Ct. at 2083.

The Eleventh Circuit's decision in this case along with decisions such as *Lovett* show that, even after *Kodak*, there is substantial need for clarification as to the district court's role in assessing the adequacy of the plaintiff's conspiracy evidence.[15]

1358 (3d Cir. 1992) (refusing to weigh competing economic theories; (summary judgment denied because plaintiffs had evidence that defendants' explanations were implausible), *cert. denied*, 113 S.Ct. 1262 (1993).

[15] Recent district court decisions after *Kodak* show a similar misunderstanding of *Matsushita*. *E.g.*, *Ehredt Underground, Inc. v. Commonwealth Edison Co.*, 848 F.Supp. 797, 809 (N.D. Ill. 1994); *Willman v. Heartland Hosp. East*, 836 F.Supp. 1522 (W.D. Mo. 1993); *aff'd*, 34 F.3d

This case provides an excellent vehicle to address those issues and resolve this conflict.

Being Profitable Does Not Eliminate Standing To Sue Under the Antitrust Laws

The Eleventh Circuit ruled that Dr. Williamson has no standing to sue under the antitrust laws because her clinic increased its profits during the course of the litigation. This theory, if accepted, would severely impair the viability of private damage causes of action as a remedy for violations of the antitrust laws.

There is no support for the Eleventh Circuit's holding. To prove standing, Dr. Williamson must show that the defendants' anticompetitive conduct caused her to suffer damages. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). Here, there was substantial evidence that the defendants anticompetitive acts stifled competition in independent radiology in Pensacola. Twenty-one new radiologists came to Pensacola after Dr. Williamson opened her clinic and all joined hospital-based practices. None of these radiologists opened a practice in competition with the hospitals other than Dr. Williamson because of the conduct of the defendants.

Certainly, Dr. Williamson suffered injury to her business or property as a result of the defendants' conduct. As the district court notes in its first order, there was "dramatic"

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605 (8th Cir. 1994), *cert. denied*, 63 U.S.L.W. 3689 (1995); *Caldwell v. American Basketball Association, Inc.*, 825 F.Supp. 558, 572 (S.D. N.Y. 1992).

evidence that patients had been diverted from her improperly as a result of the defendants' conduct (A32). In the meantime, while Dr. Williamson made modest gains in the marketplace, both Baptist and Sacred Heart experienced growth in the breast care market far beyond that gained by Dr. Williamson. *See Oltz v. St. Peter's Community Hospital*, 861 F.2d 1440, 1448 (9th Cir. 1988) (increase in defendant's income relevant to prove injury).[16] The evidence suggests that many of the procedures performed at Sacred Heart and Baptist would have been performed at Dr. Williamson's clinic if patients had not been diverted from her as a result of the conspiracy. The decision below conflicts with numerous cases in other circuits permitting profitable plaintiffs to seek relief under the antitrust laws.[17] These cases suggest that profitability, as a matter of law, is no absolute indicator of competitive injury.

In the final analysis it is not for the defendants to say how much Dr. Williamson or her clinic would or should have made. That decision was for the market to decide. Whether

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[16] During the same period of time, Dr. Williamson's clinic's revenue grew by 34.7%, Sacred Heart's expanded its breast care revenue by 124%. Although Dr. Williamson was the first in town to focus on this market, Baptist and Sacred Heart soon far surpassed her market share. During the twelve months ending December, 1989, Dr. Williamson performed 2,029 bilateral mammograms. During the same period of time, Sacred Heart performed 4864. Baptist did even better. In one twelve month period ending in October, 1989, Baptist performed 5,116 bilateral mammograms to Dr. Williamson's 1953 (App. I-1 at 37).

[17] E.g., *Wilk v. American Medical Association*, 895 F.2d 352, 360 (7th Cir.), *cert. denied*, 496 U.S. 927 (1990); *MCI Communications Corp. v. AT&T*, 708 F.2d 1081 (7th Cir. 1983), *cert. denied*, 464 U.S. 891 (1983); *Litton Systems, Inc. v. AT&T*, 700 F.2d 785 (2d Cir. 1983); *cert. denied*, 464 U.S. 1073 (1984); *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056 (3d Cir.), *cert. denied*, 439 U.S. 838 (1978).

Dr. Williamson suffered competitive injury despite her increased profits was a factual issue for the jury.

This Court should grant certiorari to confirm that a plaintiff need not be in bankruptcy to successfully sue under the antitrust laws.

The Proper Role of the Antitrust Laws in Privilege Disputes

As evidenced by the bizarre procedural history in this case, issues of conspiracy and staff privilege actions have long troubled the courts.[18] However, most doubts on any of the issues typically raised by such cases have been resolved consistently against the physician. The courts have been hostile to antitrust actions brought on behalf of physicians and the decisions below are reflective of this hostility.[19] In many of these cases, this hostility is justified. Disputes over a physician's quality of care should not be resolved under the Sherman Act. However, the abuse of the antitrust laws by some plaintiffs should not result in increased barriers that

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[18] One example is the current split among the circuits over whether the medical staff is capable of conspiracy with the hospital. The Ninth and Eleventh Circuit have held that the medical staff may conspire with the hospital. *Todorov v. DCH Health Care Auth.*, 921 F.2d 1438 (11th Cir. 1991); *Oltz v. St. Peter's Community Hospital*, 861 F.2d 1440 (9th Cir. 1988). The Third, Fourth, Sixth, and Seventh have held to the contrary. *Nanavati v. Burdette Tomlin Mem. Hosp.*, 857 F.2d 96 (3d Cir. 1988), *cert. denied*, 489 U.S. 1078 (1989); *Oksanen v. Page Mem. Hosp.*, 945 F.2d 696 (4th Cir. 1991) (en banc), *cert denied*, 502 U.S. 1074 (1992); *Nurse Midwifery Assocs. v. Hibbett*, 918 F.2d 605 (6th Cir. 1990), *cert denied*, 502 U.S. 952 (1991); *Pudlo v. Adamski*, 2 F.3d 1153 (7th Cir. 1993), *cert. denied*, 114 S.Ct. 879 (1994).

[19] See cases collected in Miles, Healthcare and Antitrust Law § 10.02 at 10-24.

eliminate legitimate claims as well. This case is not a dispute over Dr. Williamson's quality of care. Rather it is an antitrust claim in the classic sense: Dr. Williamson, the owner of an independent business, argues here that the two dominate providers of services in her market have conspired to stifle competition from her business and other independent businesses like hers. Thus, this case presents an excellent vehicle for addressing proof of conspiracy in staff privilege actions because it permits the court to highlight the appropriate use of the antitrust laws in disputes between physicians and hospitals.

This Court has been required to intercede on two previous occasions to correct circuit opinions imposing additional burdens on physician antitrust plaintiffs. In *Summit Health* this Court rejected decisions by the circuit courts imposing higher burdens in proving interstate commerce in staff privilege actions. *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322 (1991). In *Patrick*, this Court reversed circuit decisions providing immunity under the state action doctrine in staff privilege actions because the conduct under review was not actively supervised by the state. *Patrick v. Burget*, 486 U.S. 94 (1988).

The Eleventh Circuit's opinion indicates that this Court's guidance is needed yet again. As a result of the hostility to physician suits against hospitals, physicians have only very rarely prevailed in such actions.[20] By granting certiorari this Court can emphasize that such hostility, misplaced in this case, should not result in additional burdens on summary judgment that will eliminate meritorious claims.

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[20] See Miles, Health Care and Antitrust Law, § 10.01 at 10-8 and cases cited therein.

CONCLUSION

This case raises important issues concerning proof of conspiracy and standing. This Court should grant certiorari to resolve these conflicts and ensure that the antitrust laws remain a viable remedy to all those aggrieved by anticompetitive conduct.

Respectfully submitted,

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Petitioners

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States
October Term, 1994

ANGEL YUH WILLIAMSON, M.D.,
PENSACOLA DIAGNOSTIC & BREAST CLINIC, P.A.,

Petitioners,

v.

SACRED HEART HOSPITAL OF PENSACOLA,
BAPTIST HOSPITAL, INC.,
PENSACOLA RADIOLOGY CONSULTANTS, P.A.,
ALBERT A. POST, M.D. and
KEITH T. SHEARLOCK, M.D.,
HEALTH FIRST NETWORK, INC.,

Respondents.

Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI
Volume I

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 93-2756

ANGEL YUH WILLIAMSON, M.D.; PENSACOLA DIAGNOSTIC BREAST CLINIC, P.A.,

Plaintiffs-Appellants,

versus

SACRED HEART HOSPITAL OF PENSACOLA; BAPTIST HOSPITAL, INC.; PENSACOLA RADIOLOGY CONSULTANTS, P.A.; ALBERT A. POST, M.D.; KEITH T. SHEARLOCK, M.D.; HEALTH FIRST NETWORK, INC.,

Defendants-Appellees.

S. RANDALL HOBGOOD, M.D., ETC., ET AL.

Defendants.

On Appeal from the United States District Court for the Northern District of Florida

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ON PETITION FOR REHEARING

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 93-2756

ANGEL YUH WILLIAMSON, M.D.; PENSACOLA DIAGNOSTIC BREAST CLINIC, P.A.,

Plaintiffs-Appellants,

versus

SACRED HEART HOSPITAL OF PENSACOLA; BAPTIST HOSPITAL, INC.; PENSACOLA RADIOLOGY CONSULTANTS, P.A.; ALBERT A. POST, M.D.; KEITH T. SHEARLOCK, M.D.; HEALTH FIRST NETWORK, INC.,

Defendants-Appellees.

S. RANDALL HOBGOOD, M.D., ETC., ET AL.

Defendants.

On Appeal from the United States District Court for the Northern District of Florida

---

ON PETITION FOR REHEARING

BEFORE: TJOFLAT, Chief Judge, DYER and HILL, Senior Circuit Judges.

PER CURIAM:

The petition for rehearing filed by appellants Angel Yuh Williamson and Pensacola Diagnostic & Breast Clinic, P.A.is

ENTERED FOR THE COURT:

_____

United States Circuit Judge

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-2756

D. C. Docket No. 89-30084-RV

ANGEL YUH WILLIAMSON, M.D.,
PENSACOLA DIAGNOSTIC & BREAST
CLINIC, P.A.,

Plaintiff-Appellant,

versus

SACRED HEART HOSPITAL OF PENSACOLA,
BAPTIST HOSPITAL, INC., PENSACOLA
RADIOLOGY CONSULTANTS, P.A., ALBERT
A. POST, M.D. and KEITH T. SHEARLOCK,
M.D., HEALTH FIRST NETWORK, INC.,

Defendants-Appellees,

S. RANDALL HOBGOOD, M.D., etc., et al.,

Defendants.

Appeal from the United States District Court
for the Northern District of Florida

(November 18, 1994)

Before TJOFLAT, Chief Judge, DYER and HILL, Senior Circuit
Judges.

EXHIBIT "1"

PER CURIAM:

This is an appeal from the entry of summary judgment in favor of the appellees. Review of the district court's grant of summary judgment is *de novo*; we must decide whether any genuine issues of material fact exist or whether the movants are entitled to judgment as a matter of law. *NAACP v. Hunt*, 891 F.2d 1555, 1559 (11th Cir. 1990) (citing *Shipes v. Hanover Inc. Co.*, 884 F.2d 1357, 1359 (11th Cir. 1989); Fed. R. Civ. P. 56 (c)). Having thoroughly reviewed the record, we agree with the conclusions reached by the district court and affirm on all counts.[1] We discuss each claim in turn.

I.

A.

This case was brought under sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26 (1988), and section 1 of the Sherman Act, 15 U.S.C. § 1 (1988). As an initial matter, we must decide whether the appellant, Dr. Williamson has standing to prosecute the antitrust claims in this case. *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1448 (11th Cir. 1991). The district court did not explicitly address the standing issue, but it is clear from the record that Dr. Williamson does not have standing to assert her section 1 claims.

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[1] In addition to the summary judgment issues, Dr. Williamson appeals the district court's decision to strike certain expert witness affidavits she filed in opposition to the appellees' motion for summary judgment. We hold that the district court did not abuse its discretion in excluding the affidavits. *See Hancock v. Hobbs*, 967 F.2d 462, 468 (11th Cir. 1992).

Standing to sue under the Sherman and Clayton Acts is a question of law. *Austin v. Blue Cross & Blue Shield*, 903 F.2d 1385, 1387 (11th Cir. 1990) (citing *Midwest Communications, Inc. v. Minnesota Twins*, 779 F.2d 444, 449 (8th Cir. 1985), *cert. denied*, 476 U.S. 1163, 106 S.Ct. 2289, 90 L.Ed.2d 730 (1986)). A court must first determine if the plaintiff suffered "antitrust injury."[2] There must be a showing that the plaintiff's injury coincides with public detriment. Generally this requires either a showing of higher prices or lower output. The record does not indicate a reduction in the output of outpatient radiological services in the Pensacola market. Competition among hospitals, private radiology groups, and other health care providers ensures that various pricing and service options are available to the public. Because of its small market share, Health Options of Pensacola ("HOP") does not have the market power to exclude competition. To the contrary, additional radiologists have entered the market, and Dr. Williamson's own practice is thriving: Both appellant's corporate income and individual salary have risen dramatically since 1984 when she opened the Pensacola Diagnostic & Breast Clinic.[3] There is simply no evidence in the record that the general public has been harmed by appellant's inability to obtain

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[2] The Supreme Court has defined antitrust injury as "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977).

[3] The clinic's revenues have risen every year, growing from $187,881.00 in the fiscal year ending April 30, 1985, to $670,996.27 for the first eleven months ending April 30, 1990. During the same period, the appellant's salary package has increased from $45,139.00 to over $250,000.00.

membership in Health First Network ("Health First"), an independent practice association organized to service members of HOP. Because there has been no harm to competition, there has been no antitrust injury, and consequently appellant lacks standing.

B.

Even if we were to afford Dr. Williamson standing to prosecute her antitrust claims, we would affirm the district court's grant of summary judgment. Dr. Williamson alleges a host of conspiracies. First, she contends that Sacred Heart Hospital ("Sacred Heart") conspired with Pensacola Radiology Consultants ("PRC"), Dr. Albert A. Post ("Post"), and others to prevent her from competing for radiology patients. Second, she alleges a similar conspiracy among Baptist Hospital ("Baptist"), Radiology Associates, and others to prevent her from competing for patients. Third, the heart of the complaint is the appellant's assertion that there was a "community wide" conspiracy among all of the appellees to prevent her from gaining membership to Health First, which effectively disqualified her from treating subscribers of HOP.

1.

There is no direct evidence that Sacred Heart, PRC, and Dr. Post conspired to prevent the appellant from competing for radiology patients. The appellant relies on circumstantial evidence of appellees' failure to accommodate her requests for staff privileges and Sacred Heart's alleged attempts to "blackball" her. The appellant does not challenge the exclusive contract between PRC and Sacred Heart. Since the exclusive contract is valid, it follows, as the district court concluded, that

the denial of Dr. Williamson's initial application for privileges in the Department of Radiology on the grounds that it violated the contract was legitimate.

The appellant assumes that her services would have been so valuable to both Sacred Heart and PRC that they should have been eager to form an alliance with her had they been acting in their economic self-interests. The appellant asserts that their actions were pretextual. These assumptions break down in light of the fact that Sacred Heart was developing its own women's center, the Ann Baroco Center (the "Center"), and under the exclusive contract PRC would gain the Center's business. The Center placed Sacred Heart into even more direct competition with the appellant. The appellant possessed a strong position in the market--granting her any type of privileges would mean that Sacred Heart was, in effect, supporting its main competitor. We find nothing in the antitrust laws mandating such assistance to a competitor. We agree with the district court's conclusion that, given this competitive environment, Sacred Heart had a procompetitive reason for denying the appellant's requests for privileges.[4]

In addition, we agree with the district court's conclusion that the appellant has failed to show the joint conduct necessary to demonstrate an antitrust violation. The Board of Directors of Sacred Heart has the final authority to grant privileges or waive bylaws requirements. None of PRC's physicians sat on

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[4] Appellant maintains that PRC and Sacred Heart should have tried to join forces with her. Her idea of merging the only two significant sources for outpatient mammography in the Pensacola area has its own anticompetitive implications. In addition, there is ample evidence of appellant's unsuccessful negotiations with PRC--they do not, however, amount to evidence of an antitrust conspiracy.

Sacred Heart's Board, and none of them played a role in drafting the credentialling criteria for the Department of Internal Medicine. Additionally, none of the PRC physicians sat on any of the committees that reviewed appellant's application, with the exception of Dr. Post who sat on the Executive Committee. Nevertheless, the ultimate credentialling decisions constituted unilateral actions taken by the Sacred Heart Board and do not support a theory of antitrust conspiracy.

Appellant alleges that her referral base was attacked through reciprocal agreements with other physicians and the use of pressure and threats to coerce those physicians into referring patients to Sacred Heart. Sacred Heart allegedly entered into agreements with physicians whereby it provided financial backing for their practices in exchange for referrals to Sacred Heart. The evidence regarding the "utilization" clauses is inconclusive. On the one hand, some of the doctors had no history of referrals to the appellant (e.g., Drs. Mixon and Howard). On the other hand, Dr. Antonelli said he always referred his patients to the appellant, and his agreement with Sacred Heart had no effect on his referral decisions. There is no evidence in the record, however, of Sacred Heart's leverage in the lending market--there is no evidence that Sacred Heart had some competitive advantage over other potential lending institutions or that its lending power was sufficient to restrain trade.

Appellant also alleges that Sacred Heart's banning of her needle placement patients constitutes circumstantial evidence of antitrust conspiracy. Appellant argues that her needle placement procedures involved no greater risk to the patient or to the specimen than did Sacred Heart's own procedures. Once again appellant's argument ignores the fact that Sacred Heart

was in direct competition with the appellant and nothing in the antitrust laws requires assisting a competitor. In addition, we agree with the district court's finding that there exists a compelling, procompetitive reason for banning appellant's procedure: She was outside the scope of Sacred Heart's quality controls. Without creating an inference of antitrust conspiracy, the decision of Sacred Heart was legitimate and reasonable given its potential liability for procedures outside its systems for evaluation and compliance.

There is no evidence in the record to support the appellant's allegation that her husband, Dr. Michael Williamson, was terminated by Pensacola Pathologists under pressure from Sacred Heart. Additionally, the only evidence in the record of PRC's and Post's attempts to intimidate physicians consists of a statement by Dr. Eugene Murphy. Murphy gave an interview to the FTC in which he said that Sacred Heart administrators tried to convince him to refer patients to Sacred Heart through an appeal to his loyalty to the hospital. Dr. Murphy apparently rebuffed these so-called threats. Post and PRC had no ability to adversely affect Murphy's practice, and there is no reason why they should be precluded from attempting to solicit business. This is the sole link between PRC, Post, and any alleged conspiracy. We, therefore, agree with the district court's conclusion that there is no genuine issue of material fact in the record concerning whether Sacred Heart, PRC, and Post conspired to violate section 1 of the Sherman Act.

As with the Sacred Heart conspiracy, there is no direct evidence that Baptist and Radiology Associates conspired to prevent the appellant from competing for patients. Baptist, however, eventually did grant the appellant the privileges she

sought. Appellant's complaint against Baptist is that Baptist failed to grant her all of the privileges she sought on the terms she demanded. Dr. Williamson claims that this failure to accommodate her is evidence of antitrust conspiracy. We, like the district court, disagree.

Within months of appellant's renewed application in February 1988, Baptist granted her full courtesy privileges under supervision--this satisfied her request for privileges that would allow her to provide follow-up care to the patients she saw at her clinic. At that time, Baptist explained that, given the interaction of the bylaws practice requirement and the valid exclusive contract with Radiology Associates, appellant would not be eligible for unsupervised privileges.[5] Appellant did not protest, and she signed a copy of the hospital bylaws. It was only after Health First denied her membership that appellant protested the level of her privileges. Even if we were to agree with appellant's assertion that Baptist's reliance on its bylaws was pretextual--that reliance would be unilateral action on the part of Baptist. There still would be insufficient evidence of a conspiracy between Baptist and Radiology Associates. Likewise, there is no evidence that Baptist attacked appellant's referral base. Indeed, the contracts between Baptist and various physicians made it clear that the loan in no way obligated the physician to refer patients to Baptist. There is no evidence that Baptist or Radiology Associates pressured doctors to divert referrals away from appellant. As with Sacred Heart, Baptist

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[5] Nothing in the record persuades us to doubt the legitimacy of either the hospital bylaws or the exclusive contract with Radiology Associates. The mere fact that the contract was reduced to written form around the same time the appellant applied for privileges is not evidence of an antitrust conspiracy. The hospital bylaws pre-date appellant's application, and there is no evidence that they had been changed.

and appellant are in direct competition for patients--therefore, Baptist would have a rational economic reason for denying appellant privileges. As we indicated above, Baptist has no legal obligation to assist or accommodate a competitor.

Appellant's theory is based on the assumption that the hospitals would realize a gain from their relationship with her because she must refer her patients to hospitals. The record indicates, however, that it is undisputed that she has never admitted a patient to any hospital at which she had privileges. Moreover, since obtaining privileges at Baptist she has visited only three patients there. We, therefore, agree with the district court that there is no issue of genuine fact concerning an alleged conspiracy between Baptist, Radiology Associates, and unnamed others.

Appellant alleges a "community wide" conspiracy among all of the appellees to prevent her from gaining membership in Health First, which limited her ability to compete for patients, in that she was effectively ineligible to treat HOP subscribers. Appellant maintains that the evidence of this conspiracy can be found in the parallel refusals of the appellees to accommodate her practice. To permit an inference of conspiracy, however, the appellant must establish that each defendant acted in a manner inconsistent with its economic self-interest. *Bolt v. Halifax Hosp. Medical Ctr.*, 891 F.2d 810, 826 (11th Cir.), *cert, denied*, 495 U.S. 924, 110 S.Ct. 1960, 109 L.Ed.2d 322 (1990) (citing *Pan-Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539, 559 (5th Cir. 1980), *cert. denied*, 454 U.S. 927, 102 S.Ct. 427, 70 L.Ed.2d 236 (1981)). As our discussion above indicates, appellant has not done so--there are compelling economic justifications for the appellees' actions. Moreover, it is difficult to find parallel

action here, given that Baptist granted appellant the privileges she requested.

There is no evidence that the appellees conspired to keep appellant out of Health First. Other marketplace factors are at work here. HMOs by their nature are exclusive. The record indicates that Health First adopted its credentialling procedure to avoid costs--this was a legitimate business decision. Sacred Heart and Baptist have effective control over the membership of Health First. This was done, however, to compete with a local privately owned hospital and its HMO. Given that at its peak, HOP controlled only between 5% and 8% of the total group health insurance market, we do not believe that the anticompetitive effects of the HMO's practice outweigh its procompetitive benefits. Although appellant has been effectively excluded from HOP, she has been a member of many other provider programs. Given that at most 8% of potential patients are excluded from choosing appellant's services, the procompetitive benefits stemming from increased consumer choice outweigh the effects of the exclusive HMO organizational structure. We agree with the district court's conclusions that the appellees' denials of appellant's applications do not support an inference of antitrust conspiracy and that Health First's admissions requirements do not unreasonably restrain trade in the market. Accordingly, we affirm the district court's grant of summary judgment for all appellees as to Count III.

II.

Count IV of the complaint is a pendent state law claim of tortious interference with business relationships against appellees Sacred Heart, PRC, and Post. Under Florida law the

elements of the claim that must be proven are: (1) the existence of a business relationship under which the plaintiff has legal rights; (2) an intentional and unjustified interference with the relationship; and (3) damage to plaintiff caused by the interference. *Ad-Vantage Tel. Directory Consultants, Inc. v. GTE Directories Corp.*, 849 F.2d 1336, 1348-49 (11th Cir. 1987) (citing *G.M. Brod & Co., Inc. v. U.S. Itome Corp.*, 759 F.2d 1526, 1534 (11th Cir. 1985); *Ethyl Corp. v. Balter*, 386 So. 2d 1220, 1223 (Fla. 3d Dist. Ct. App. 1980), *cert. denied*, 452 U.S. 955, 101 S.Ct. 3099, 69 L.Ed.2d 965 (1981)); *see Tamiami Trail Tours, Inc. v. Cotton*, 463 So. 2d 1125, 1126 (Fla. 1985) (per curiam). The interference must be direct and the defendant must not have been acting to protect its own legitimate economic interests.

As is clear from the discussion above, we believe that Sacred Heart acted in its own economic self-interest. Its actions with regard to the needle placement controversy were consistent with its goals of maintaining control over hospital procedures--any effect on appellant's practice was incidental. Similarly, contracts between Sacred Heart and various physicians furthered legitimate business interests of both the hospital and the physicians; any effect on referrals to appellant was not caused by any action taken by Sacred Heart.

Again, the only evidence in support of appellant's claim against PRC and Post is that Post tried to encourage Dr. Murphy to refer patients to Sacred Heart's radiology department. This conduct--solicitation of potential customers--is not tortious. The doctors were engaged in competition for patients and did not use improper means. Moreover, there is no evidence that appellant was harmed--Murphy did not change his business practice; he continued to refer patients to appellant.

Having reviewed the record, we agree with the district court's conclusion that there are no genuine issues of material fact remaining in this case.

The judgment of the district court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

ANGEL YUH WILLIAMSON, M.D., et al.,

Plaintiffs,

v. Case No. 89-30084-RV

SACRED HEART HOSPITAL OF PENSACOLA, et al.,

Defendants.

_____/

ORDER

Pending are motions for summary judgment filed by defendants Baptist Hospital ("Baptist") (doc. 291), Pensacola Radiology Consultants, P.A. ("PRC") and Albert A. Post, M.D. (Docs. 293-295), Health First Network, Inc. ("Health First") and Keith T. Shearlock, M.D. (doc. 296), and Sacred Heart Hospital of Pensacola ("Sacred Heart") (doc. 301). For the reasons stated below, the motion filed by PRC and Post is GRANTED as to Counts I, III, and IV. The remaining motions are DENIED.

I. FACTUAL BACKGROUND AND LEGAL STANDARD.

Plaintiff Angel Williamson, M.D., is a physician radiologist. Since its formation in May 1984, she has been the sole owner of plaintiff Pensacola Diagnostic Center Breast Clinic ("the Clinic"), which provides radiology and related medical services.[1] At the Clinic, plaintiff specializes in the diagnosis, care, and treatment of breast disease in women. She examines and treats patients and, if necessary, refers the patient to a surgeon.

This form of comprehensive breast care contrasts with the more traditional approach, in which the patient may need to separately consult a general practitioner, a radiologist, and a specialist. There is evidence suggesting that plaintiff's style of care differs from the traditional approach by virtue of an increased emphasis on extensive consultation with the patient before, during, and after the examination, and increased follow-up with consulting physicians. In providing these services, the Clinic competes with defendants Sacred Heart, Baptist, and PRC within the Pensacola, Florida area.

Plaintiff alleges that a large percentage of her potential patients are members of one of two health maintenance organizations ("HMOs"): Health Options of Pensacola ("HOP"), operated by Florida Blue Cross/Blue Shield; and Met Elect, operated by Metropolitan Life Insurance Company. Plaintiff is a member of Met Elect.

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[1] Since Dr. Williamson is the sole owner of the Clinic, the other plaintiff in this lawsuit, I refer to her as "the plaintiff" for the sake of brevity.

HOP is jointly and equally owned by: (1) Blue Cross/Blue Shield; (2) an affiliate of defendant Sacred Heart; (3) an affiliate of Baptist; and (4) defendant Health First, which functioned as the Independent Physicians Association ("IPA") for HOP. Its members exclusively provided physician services to HOP subscribers. Thus, to do business with patients who are HOP subscribers, plaintiff must be a member of Health First. Health First's membership rules required all independent radiologist to have staff privileges at an "affiliated" hospital --- in plaintiff's case, that meant either defendant Baptist or Sacred Heart.

Plaintiff has applied for, and been denied: (1) staff privileges at Sacred Heart in three departments; (2) full staff privileges at Baptist (as opposed to privileges "under supervision," which do not satisfy Health First's requirement); and (3) membership in Health First. Plaintiff argues that these denials were wrongful, supported by pretextual reasons, and effected in furtherance of an anticompetitive conspiracy.

According to plaintiff, the denials of membership and privileges were wrongfully accomplished through a number of means. Both hospitals had exclusive contracts with radiology practice groups for the provision of radiological services. Plaintiff maintains that these contracts were used as a pretext to deny plaintiff staff status, despite the fact that other radiologists who were not members of the respective practice groups had been granted staff status. Further, both hospitals allegedly adopted, amended, interpreted, and applied their bylaws in such a manner as to prevent an independent radiologist from gaining staff privileges. In addition, both hospitals applied economic pressure on area doctors to avoid referring patients to plaintiff. Finally, Sacred Heart applied economic pressure on Pensacola

Pathologists, a medical group that employed plaintiff's husband, to coerce plaintiff to scale back its aggressive competition with Sacred Heart.

Plaintiff asserts three claims under Section 1 of the Sherman Antitrust Act, Title 15, *United States Code*, Section 1. Count I charges defendants Sacred Heart, PRC, and Dr. Post only with Sherman Act violations. Count II is against Baptist only. Count III alleges a conspiracy among all of the defendants to injure plaintiff's ability to compete. Count IV asserts a pendent Florida law cause of action for tortious interference with plaintiff's business.

A motion for summary judgment should be granted when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), Fed.R. Civ.P. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); *Everett v. Napper*, 833 F.2d 1507, 1510 (11th Cir. 1987). An issue of fact is "material" if it might affect the outcome of the case under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986). It is "genuine" if the record taken as a whole could lead a rational trier of fact to find for the non-moving party. *See Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986).

"The moving party is entitled to judgment as a matter of law if the nonmoving party cannot sufficiently show an essential element of the case to which the nonmoving party has the burden of proof." *Cornelius v. Town of Highland Lake*, 880

F.2d 348, 351 (11th Cir. 1989), *cert. denied sub nom., Spears v. Cornelius,* ___ U.S ___, 110 S.Ct. 1784, 108 L.Ed.2d 785 (1990). However, summary judgment is improper "[i]f a reasonable fact finder could draw more than one inference from the facts, and that inference creates a genuine issue of material fact." *Id.*

On a summary judgment motion, the record and all inferences that can be drawn from it, must be viewed in the light most favorable to the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 8 L.Ed.2d 176 (1962). Furthermore, the court must consider the entire record in the case, not just those pieces of evidence which have been singled out for attention by the parties. *See Clinkscales v. Chevron USA, Inc.*, 831 F.2d 1565, 1570 (11th Cir. 1987).

II. DISCUSSION.

The parties are in general agreement on the elements to be proved on the antitrust claims. Plaintiff must show that the defendants have entered into a contract, combination, or conspiracy, and that the result of this conspiracy is an unreasonable restraint of trade. *NCAA v. Board of Regents*, 468 U.S. 85, 98-99, 104 S.Ct. 2948, ____, 82 L.Ed.2d 70, 81-82 (1984). To carry this burden, plaintiff may rely on either direct or circumstantial evidence; in most cases, however, plaintiffs rely on the latter. *Bolt v. Halifax Hospital Medical Center*, 891 F.2d 810, 819 (11th Cir. 1990).

When relying on circumstantial evidence to prove a conspiracy, a plaintiff must first show a non-legitimate motive for entering into such a conspiracy - - - that it would inure to the defendant's economic benefit. *Id.* Next, the plaintiff must

adduce evidence "that tends to exclude the possibility that the alleged co-conspirators acted independently and in a manner consistent with rational business objectives." *Id.* Although the plaintiff must ultimately show a "conscious commitment" on the part of the conspirators to enter a scheme designed to achieve an objective that is unlawful, the plaintiff need not show a specific intent to restrain trade or to build a monopoly; if the conspiracy has an anticompetitive effect, that may be sufficient. *Id.* at 819-820. The plaintiff must show, in addition to motive: (1) an intent to adhere to an agreement, which is (2) designed to achieve an unlawful objective. *Id.*

In *Bolt*, the Eleventh Circuit held that hospitals and doctors have a "rational economic motive" sufficient for antitrust purposes if they deny or revoke a physicians' privileges. *Id.* at 820. The court held, apparently on the basis of a law review article and a simplified application of supply and demand, that excluding a physician from practice in a hospital allows the remaining doctors to charge a higher price. *Id.* Therefore, in this Circuit, denial or revocation of medical privileges is always presumptively economically motivated. Thus, the test turns only on the second prong.

To determine the reasonableness of a restraint of trade, courts either declare the restraint illegal *per se* or analyze the claim under the "rule of reason." Under the latter approach, a restraint is unreasonable if it has an adverse effect on competition and cannot be justified as a procompetitive measure. *Seagood Trading Corp. v. Jerrico, Inc.*, 924 F.2d 1555, 1567 (11th Cir. 1991). The presumption in Section 1 cases is that the rule of reason standard applies. *Id.*

Per se illegality is the rule where the conduct involved "always or almost always tends to restrict competition and decrease output." *Id., citing Northwest Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 289-290, 105 S.Ct. 2613, 86 L.Ed.2d 202 (1985). Where a *per se* analysis is followed, the court need not conduct an elaborate analysis of market power and injury to competition. *Id.*

Plaintiff asserts that her antitrust claims fall under the *per se* approach, because her allegations, if proven, will establish a "group boycott" by the defendants. Horizontal group boycotts, or "concerted refusals to deal," are often subject to *per se* analysis. *See id.* at 1568, and authorities cited therein. In *Seagood Trading*, the Eleventh Circuit, interpreting Supreme Court and Eleventh Circuit authority, held that where two or more distinct entities agree to refuse to deal with a particular party, the arrangement is *per se* illegal. *Id.* The court distinguished those cases involving joint enterprises acting as a unit, or where the defendants share some other form of economic integration. *Id.* at 1567-1568, *citing Northwest Wholesale*, 472 U.S. at 295-297. The court also distinguished cases where one defendant refuses to deal with the plaintiff, and the other defendant instigated that refusal. *Id.* at 1568.

Nevertheless, for purposes of this analysis, I assume that a rule of reason analysis will be required. That does not mean that an elaborate inquiry into market definition or market power is necessary. In *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 106 S.Ct. 2009, 90 L.Ed.2d 445 (1986), the Supreme Court of the United States held that a "relevant market" inquiry is unnecessary where there is evidence of actual noncompetitive effects. In that Section 1 Sherman Act case, the

Court rejected an argument challenging a lack of findings regarding market definition and market power:

> Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, "proof of actual detrimental effects, such as a reduction of output" can obviate the need for an inquiry into market power, which is but a "surrogate for detrimental effects."
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> *Id.* at 461, *citing* 7 P. Areeda, *Antitrust Law* ¶1511, p. 429 (1986).

Based on the record, I conclude that plaintiff has presented sufficient evidence of "actual detrimental effects" to render an elaborate market analysis unnecessary, at least at this stage of the case. She has also presented sufficient evidence to withstand summary judgment on the issues of injury to competition and actual injury suffered by her. Plaintiff presents the affidavit of another independent radiologist, Dr. Thomas Brown, who details the adverse effects his practice has suffered, allegedly because of the conduct of defendants. She also presents evidence tending to show that economic leverage used by defendants Baptist and Sacred Heart over numerous doctors have decreased referrals from those doctors. Further, by presenting evidence on the conspiracy generally, plaintiff has provided evidence that defendants have prevented plaintiff and Dr. Brown from competing with defendants for HOP patients. Finally, by offering evidence that her fees are substantially lower than those of her competitors (and would have been even lower if Health First had taken her up on her offer to discount

services in exchange for Health First membership), plaintiff has submitted evidence tending to show that defendants' actions have raised prices overall in the subject market. Summary judgment is not appropriate on the grounds of market definition, market power, injury to competition, or actual antitrust injury to plaintiff.

Finally, I conclude that the Health Care Quality Improvement Act, Title 42, *United States Code*, Sections 11101, *et seq.*, do not apply to bar plaintiff's claims. This statute creates antitrust immunity for a "professional review body" in connection with a "professional review action." 42 U.S.C. §11111(a). Defendants correctly point out that Sacred Heart, Baptist, and Health First qualify as "professional review bodies," and that their decisions regarding privileges and membership facially qualify as "professional review actions."[2] However, they also concede, as they must, that for immunity to attach, the review action must have been taken "in the reasonable belief that the action was in the furtherance of quality of care," and "in the reasonable belief that the action was warranted by the facts known after [a] reasonable effort to obtain the facts and after [providing] notice and hearing procedures." *Id.*, §11112(a). The statute creates a rebuttable presumption that these requirements have been met. *Id.*

As plaintiff points out, the entire thrust of her claims is that the defendants did not act in a reasonable belief that their actions furthered quality health care. As explained below, I

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[2] Not all of the actions alleged to have been taken by the defendants necessarily qualify as "professional review actions." For example, the alleged actions taken to divert referrals from plaintiff to defendants do not so qualify. Thus, even if the HCQIA acted to bar liability for the denial of privileges, antitrust liability could still exist with respect to non-qualifying actions.

conclude that sufficient evidence exists to create a genuine factual issue on this question. Thus, Section 11112(a)'s presumption has been effectively rebutted for the purposes of summary judgment.

Having set out the appropriate legal standards and resolved some preliminary summary judgment issues, I turn to the heart of the pending motions: whether the evidence in the present record may reasonably support an inference of an antitrust conspiracy.

III. EVIDENCE OF AN ANTITRUST CONSPIRACY.

Sufficient evidence exists to create a genuine issue of fact on whether the defendants conspired to injure plaintiff's practice. While most of this evidence, by necessity, is circumstantial, plaintiff does provide some arguably direct evidence of improper motive concerning Sacred Heart.

A. Direct Evidence.

1. **Retaliation Against Plaintiff.** In early 1984, plaintiff discussed her planned clinic for over three hours with Dr. Whitcomb, Sacred Heart's medical director. Plaintiff has testified at deposition that Whitcomb pressed her for details, and warned her, "If you open, we're going to close you one way or the other, we're going to blackball you." *See* Williamson dep., doc. 309, App. II-34 at 134, 368-269. Plaintiff, to whom English is a second language, testified that she remembered the word "blackball" distinctly because she had to go home and look it up in the dictionary.

2. **Retaliation Against Physicians Generally.** Sacred Heart's willingness to "blackball"

uncooperative physicians is supported by the testimony of Dr. Eugene Murphy, a doctor with 90% of his practice at Sacred Heart who gave a sworn statement before the Federal Trade Commission several months prior to his death.[3] Dr. Murphy testified that Sacred Heart was not happy that he used plaintiff's services. In several meetings with Murphy, Sacred Heart administrators, including Jay Hardman and defendant Dr. Post, tried to convince him to divert referrals to Sacred Heart. According to Murphy, the administrators focused on "loyalty" to the hospital, rather than on quality of care issues. Murphy refused, citing plaintiff's superior service and lower costs.

He stated that because he had an established practice that could be taken elsewhere, he had enough leverage to "resist that, the gentle armtwisting." Doc. 309, App. II-19 (Part 2), at 34. However, Murphy said, younger physicians with less established practices were more susceptible to such pressure, the methods of which he described in detail. Murphy stated that uncooperative physicians were subject to being "blackballed,"

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[3] Defendants object to Dr. Murphy's testimony on hearsay grounds. Plaintiffs respond that the testimony is admissible under Federal Rule of Evidence 803(24), entitled "Other Exceptions," which allows evidence having "circumstantial guarantees of trustworthiness," if it is material, more probative on the relevant point than any other evidence, and its admission will serve the interests of justice.

Preliminarily, Dr. Murphy's sworn testimony before the FTC may fall within Rule 803(24). *See, e.g., FTC v. Amy Travel*, 875 F.2d 564, 576 (7th Cir. 1989) (consumer statement to the FTC admissible over hearsay objection, even where there was no opportunity for cross-examination); *and Furtado v. Bishop*, 604 F.2d 80 (1st Cir. 1979) (affidavit of a deceased eminent attorney is admissible). However, even without this testimony, there is sufficient evidence to withstand summary judgment. Accordingly, I defer ruling on this objection until trial.

a process which could include a loss of referrals. *Id.* at 33-36, 48.

Plaintiff has testified that Drs. Stalnaker and Horan specifically warned her that their referrals to her would drop because of their new contracts with Sacred Heart. She further testified that Drs. Westafer and Irvin both declined to comment on the record on the subject of referrals because of fears of retaliation from Baptist and Sacred Heart.

3. **Retaliation Against Plaintiff's Husband.** Finally, plaintiff provides the testimony of herself and her husband, Dr. Michael Williamson ("Dr. Williamson"), that Sacred Heart successfully pressured his practice group, Pensacola Pathologists, to fire him. Dr. Williamson testified that at a Pensacola Pathologists meeting shortly after plaintiff began advertising her new clinic, Dr. Hilbert, founder of Pensacola Pathologists, told him that Sacred Heart was upset with the clinic's advertisements, and that this could mean trouble for the practice group, which meant trouble for him. At about the same period of time, Sister Mary Carroll of Sacred Heart began to question Dr. Hilbert about the quality of Dr. Williamson's work.

Plaintiff has testified that in a late 1985 meeting with Sacred Heart's Administrator, Jay Hardman, regarding her "needle placement procedure" patients (see below), Hardman asked her how she would feel if Pensacola Pathologists lost its

exclusive contract with Sacred Heart. This exchange is reflected in notes plaintiff made of the meeting.[4]

In 1988, the practice group's contract with Sacred Heart expired, litigation between plaintiff and Sacred Heart was imminent, and renewal of the contract was delayed. Dr. Stalnaker reportedly warned plaintiff that if she filed, her husband would be fired. During this time, Hardman's logs show frequent visits to Dr. McConnell of Pensacola Pathologists, even though neither one of them had primary responsibility for renegotiating the contract. On June 14, 1989, negotiations between Sacred Heart and Pensacola Pathologists were finally completed. On the same day, Drs. Howard and Hilbert informed Dr. Williamson that he would be fired. The next day, Sacred Heart signed the contract extension. On June 22, Pensacola Pathology's board formally voted to terminate Dr. Williamson. As a result, he lost his staff privileges at Sacred Heart.

B. Circumstantial Evidence: Sacred Heart.

1. **Denial of Privileges.** When Sacred Heart denied plaintiff's first application for staff privileges in the department of radiology, it explained that she was barred by Sacred Heart's exclusive contract with defendant PRC. However, PRC's head, Dr. Post, explained at deposition that the exclusive contract applied to the performance of imaging procedures such as x-rays and ultrasound. Plaintiff repeatedly made clear in her communications with Sacred Heart (and Baptist) that she did not

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[4]Plaintiff also attempts to relay on purported statements of Dr. Fenner McConnell, a Pensacola Pathologist member. These are hearsay and not admissible for purposes of this motion.

wish to perform such procedures at the hospital; rather, she merely wished to be able to "follow up" her outpatient clinic care at the hospital when her patient's treatment involved a hospital stay.[5] Dr. David Cross, one-time President of the Sacred Heart medical staff, thought this request made sense, and approached Sacred Heart Administrator Jay Hardman about accommodating plaintiff, which Hardman refused to do.

Plaintiff argues that such accommodation occurred in other cases. For example, she presents the affidavit of Dr. Thomas Brown, who affirms that for three years he enjoyed radiology privileges, even though he conducted an independent radiology practice and was not a member of PRC. His privileges were terminated only after he began to pick up Blue Cross/Blue Shield PPC patients. Sacred Heart admits this, but argues that Brown was not permitted to actually furnish radiological services at the Sacred Heart "or exercise any clinical privileges" at the hospital. Doc. 301, at 17. Plaintiffs provide another example of exceptions made to the exclusive radiology contract --- namely, perinatologists who performed OB-ultrasound at Sacred Heart. She also provides examples of exceptions made with respect to exclusive contracts in other departments, but most of these involved provisions for exceptions appearing in the contract language itself.

Barred from radiology privileges at Sacred Heart, plaintiff later applied for privileges in the departments of Internal Medicine or Family Practice. Plaintiff presents

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[5] This "follow-up care" included speaking with her patients in the hospital and, at the request of the admitting physician, doing physical histories, medical exams, providing medical advice, reviewing patients' charts, writing orders, and consulting with other physicians about the patients' breast care.

evidence that this was not an unreasonable proposal either, because Sacred Heart had previously granted Internal medicine privileges to "subspecialists" such as dermatologist, neurologists, and psychiatrists, all of whom were not general practitioners of internal medicine. She was prepared to present Sacred Heart with evidence that the comprehensive breast care she provided qualified as such a subspecialty.

Sacred Heart's bylaws provided for "Level I" privileges in these departments if the physician was qualified to "treat mild, uncomplicated illnesses ...". *Id.*, App. III, at 213. None of the defendants dispute that plaintiff was so qualified. A physician was also required to have completed one year of post-graduate clinical training in a "medically-oriented specialty." Plaintiff had a residency in nuclear medicine; she presents expert testimony that "nuclear medicine," a specialty recognized by the AMA since 1971, qualifies as a "medically-oriented specialty."

However, during the pendency of her application, the bylaws were amended to require a "primary care medically-oriented specialty." Significantly, plaintiff maintains that this amendment occurred through a violation of Sacred Heart's internal procedures for amending the bylaws. Relying on the deposition testimony of several Sacred Heart employees present at the relevant meetings, plaintiff asserts that certain amendments to the bylaws had gone up through the normal procedural channels without the "primary care" addition. Just before the final vote by the general staff on a new version of the bylaws, this language was added, in violation of the procedure for adopting amendments. Administrator Hardman could offer no explanation for this eleventh hour change, admitting that it was "highly unusual." *Id.*, App. II-13, at

160-161. The scope of the "primary care" requirement was limited: it was not added to the corresponding qualifications listed in the bylaws regarding the "subspecialties," such as dermatology, psychiatry, etc.

Given this change, plaintiff was no longer technically qualified for Internal Medicine or Family Practice privileges. The Sacred Heart credentials committee appealed to the radiology department to find a place for her, a request which was not fulfilled.

Two years later, plaintiff tried again, arguing that her nuclear and diagnostic residencies qualified her for privileges in some appropriate department so that she could provide general breast care without violating PRC's exclusive contract for on-site performance of imaging procedures. According to the affidavit of Dr. David Thomae, who was present at this credentials committee meeting, the committee members concluded that (1) plaintiff was qualified to treat "mild, uncomplicated illnesses," as required for Level I privileges; (2) the quality of care at the hospital would improve if plaintiff were granted privileges; and (3) granting her privileges would be in the overall best interests of the hospital. However, Sacred Heart informed the committee that its only task was to decide if plaintiff fit the criteria in the bylaws. In doing so, plaintiff argues, Sacred Heart willfully failed to inform the committee of its ability to waive bylaws requirements when circumstances required. Literally applying the criteria, the committee again denied plaintiff's request. Although the minutes of the committee do not reflect it, Thomae affirms that some members of the credentials committee requested the bylaws committee to find a place for plaintiff.

Plaintiff attempted to appeal this decision to the appropriate Sacred Heart administrative hearing body. Plaintiff attempted to present evidence on her own qualifications, the appropriateness of a waiver in her case, and the propriety of recognizing a subspecialty covering her field. She was precluded from presenting any evidence on the grounds that only the full hospital Board had the authority to grant such a waiver.

2. **"Attack" On Referral Base.** Plaintiff depends on referrals from other doctors for her business. Her main sources of referrals were Drs. Stalnaker, Murphy, Belk, Irvin, Mixon, and Howard. Citing evidence that Sacred Heart and PRC kept strict track of how many referrals each Sacred Heart-affiliated doctor made to Sacred Heart radiologists, plaintiff alleges that Sacred Heart entered into business arrangements with each of these doctors which furnished it leverage over those doctors, and that referrals from those doctors drastically dropped in the years immediately afterwards.

The figures are dramatic. Records show that in 1986, plaintiff received 800 new referrals from these doctors. By 1988, after the arrangements with Sacred Heart were entered into, that number had dropped to 155; by 1990, to 63. These reductions came at a time when referrals from other doctors not affiliated with any of the defendants were increasing.[6] None of the physicians involved cited concerns regarding the quality of plaintiff's care to explain the reductions; in fact, some of

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[6] Dr. Epps, who was without contractual ties to either hospital, testified that during the same period her referrals to plaintiff increased from 34 (in 1987) to 325 (in 1990).

them continued to refer relatives and close friends to plaintiff, while ordinary patients were being referred to Sacred Heart. Some of the physicians involved admitted that the contractual arrangements with Sacred Heart motivated the change in referral practice, while others denied any relationship between the two.

Many of the agreements in question explicitly refer to patient referrals. Sacred Heart loaned Drs. Horan and Turner $500,000 to buy the practice of Dr. Murphy and Dr. Stalnaker, the latter of whom went on to become the director of the OB/GYN residence program at Sacred Heart. The contract contained the condition that they use its outpatient facilities to the extent feasible unless patient choice dictated otherwise.[7] A similar arrangement was reached with Drs. Mixon and Howard, who contracted with Sacred Heart to operate a family care clinic. Howard's contract required him to use Sacred Heart doctors whenever practical to assure "continuity of care." Mixon's contract obligated him to use Sacred Heart's radiological services.[8] Significantly, the affidavit of Dr. Thomas Brown, the only other independent radiologist in Pensacola at the time, indicates that referrals to him ceased after these contractual arrangements were made. Brown's affidavit constitutes evidence on the harm caused to competition generally, and tends to rebut the defendants' legal argument that

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[7] Plaintiff has testified that Drs. Stalnaker and Horan specifically warned her that their referrals would drop because of their new contracts with Sacred Heart.

[8] At deposition, Dr. Turner, but not Dr. Horan, agreed that the contract required him to refer patients to Sacred Heart.

Drs. Belk and Irvin entered into a joint venture with Sacred Heart to operate a medical clinic. Their contracts did not mention referrals, but referrals did decrease dramatically afterwards.

no antitrust cause of action exists where only one competitor is injured.

One physician, Dr. Emilio A. Antonetti, testified at deposition that Sacred Heart insisted on a similar referral clause --- one requiring Sacred Heart referrals "to the extent feasible" and subject to patient choice --- in its loan agreement with him, but that he still sends substantial amounts of referrals to plaintiff, because he views her care as clearly superior. Antonetti also testified that Sacred Heart had originally proposed referral language even more restrictive than that eventually adopted, but he refused because he felt referrals should be based on quality of care concerns. According to deposition testimony, after a similar refusal by Dr. Fowler, Sacred Heart refused to renew the lease for the pharmacy he operated, forcing it to close down. Sacred Heart presents evidence that it closed down the pharmacy because of poor performance, but plaintiff counters with evidence showing that it was as profitable as at least one other pharmacy partially owned by Sacred Heart and not closed down.

Further, the record contains evidence regarding enforcement mechanisms for these requirements. Plaintiff presents the affidavit of Dr. Howard's nurse indicating that once the contract with Sacred Heart was established, Sacred Heart sent a "head nurse" to enforce the new referral policy. Dr. Howard's staff was instructed to refer all patients to Sacred Heart, without asking them where they wanted to go, unless they affirmatively objected.[9] The staff was also required to

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[9] It was precisely this sort of "channeling of patient choice" that the Eleventh Circuit found to constitute an antitrust injury to competition in *Key Enterprises of Delaware, Inc. v. Venice Hospital*, 919 F.2d 1550, 1554, 1559

keep statistics on all the clinic's referrals to hospitals, other physicians, laboratories, and diagnostic centers. These statistics would be presented monthly at Sacred Heart meetings.

3. The Needle Placement Procedure Controversy. Plaintiff alleges further retaliation by Sacred Heart regarding her "needle placement procedure."[10] Plaintiff presents deposition testimony from Sacred Heart doctors attesting that they had worked with plaintiff on the procedure on numerous occasions without any quality of care problems arising. Shortly after Sacred Heart denied plaintiff's first application for staff privileges, Administrator Jay Hardman began discussions that eventually led to the hospital's decision not to accept plaintiff's needle placement patients.[11]

(11th Cir. 1990).

[10] This procedure is apparently used when an examination reveals a small lesion in a patient's breast which must be removed for analysis. Often these lesions are too small to be found easily by the surgeon. Plaintiff inserts a "Kopan's needle," a medical device containing a thin hook-wire device. The needle is removed, leaving the hook-wire near the lesion to mark it. The patient is then walked from plaintiff's office across the parking lot to the Sacred Heart Surgicenter, where a surgeon would remove the lesion. While the patient remained in the Surgicenter, the specimen would be returned to plaintiff for dissection and another x-ray to ensure that the proper tissue had been removed. At that point the tissue would be sent to Sacred heart's pathology department for examination. In her opposition memorandum, plaintiff represents that the procedure employed by Sacred Heart radiologists differs only in that the specimen is returned to her clinic rather than to the hospital for the verifying x-ray.

[11] Hardman consulted with Dr. Bell of the pathology department and Dr. McMahon in the department of surgery. In addition, he consulted with defendant Dr. Post of the radiology department. In his deposition, Hardman denied having any reason to discuss the matter with Dr. Post, but another Sacred heart administrator, Dr. Lohmiller, confirmed that Dr. Post was involved. Plaintiff suggests Dr. Post's involvement illustrates that the decision was

Plaintiff presents expert testimony that the procedure was medically sound, and that the hospital's concerns were unfounded. In addition, plaintiff once again presents what she considers inconsistent applications of the stated concerns which prove their pretextual nature. For example, the hospital objected to the delay caused by patients having to walk from plaintiff's office to the Surgicenter. However, plaintiff's office is closer to the Surgicenter than the hospital's own radiology department. Sacred Heart also expressed concern that the specimen is outside its control when sent to plaintiff. However, Sacred Heart physicians and administrators conceded that the hospital uses numerous "outside" reference laboratories and sends specimens to them routinely. Finding no reason to distinguish these specimens from those sent to plaintiff, Dr. William Belk characterized this justification as "silly." Doc. 309, App. II-27 at 41-42. The rest of the justifications were consequences of plaintiff's lack of staff privileges. Plaintiff argues that these concerns, largely administrative in nature, would have evaporated had she been given the accommodation regarding staff privileges she felt she deserved.

B. Baptist.

1. Denial of Privileges.

Plaintiff had the same difficulties in obtaining privileges at Baptist, but ultimately she obtained more favorable results.[12]

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motivated by concerns regarding plaintiff's radiology competition rather than the medical concerns raised by Sacred Heart.

[12] Plaintiff alleges initially that Baptist delayed sending her an application. She first wrote for one in November 1984. The next month, Administrator John Robbins responded without enclosing an application, which

In late 1984, plaintiff wrote Baptist Administrator John Robbins to request radiology privileges, making clear that she did not seek to actually perform radiological services at Baptist. Robbins rejected plaintiff's request, citing its exclusive agreement with Radiology Associates regarding the performance of radiological services. Unlike Sacred Heart, Baptist did not have a written contract establishing the exclusive rights. However, Baptist's witnesses have testified that Baptist and Radiology Associates had proceeded on an oral understanding for the last several decades.[13]

As with Sacred Heart, plaintiff alleges that exceptions were made in other cases, but not in hers. Plaintiff cites the testimony of Dr. Bender, a member of Baptist's radiology staff, who indicated that Dr. McMahon, a non-member, performed pelvic and breast ultrasound at the hospital. In addition, plaintiff presents evidence that Baptist's cardiology group performed cardiac ultrasound until the late 1970s. Most importantly, plaintiff emphasizes testimony from Baptist's radiologists that they had no opposition to privileges for plaintiff, provided she did not use the hospital's radiology equipment. At an April 1985 meeting, the hospital's Executive

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she did not receive until May 13, 1985.

[13] Plaintiff disputes this, pointing to the testimony of Lynn Sheppard, Robbins' assistant, who testified that she was not aware of the exclusive agreement until plaintiff applied for privileges. Since Robbins admittedly relied on Sheppard regarding staff privileges matters, plaintiff argues, she would have been aware of any such agreement had it existed. In addition, plaintiff cites other exclusive contracts which had been reduced to writing, questioning why Baptist would choose not to do so in this case.

Committee denied plaintiff's request. The minutes of the meeting do not reflect that the radiologists' lack of opposition was considered.

Undeterred by her initial rebuff, the plaintiff obtained an application in May 1985. The next month, the hospital reduced the oral agreement with Radiology Associates to writing. This contract became the basis for Baptist's second denial of the plaintiff's application in June 1985.

Plaintiff waited until December 1987 to try again, seeking privileges in either radiology, internal medicine, or family practice. In January 1988, Baptist responded by re-explaining the exclusive radiology contract, and asking for an explanation of exactly what plaintiff proposed to do --- which, plaintiff maintains, she had already provided Baptist on the first two attempts to gain privileges. Plaintiff complied with Baptist's request. In August 1988 Baptist granted her "under supervision" privileges in radiology, on the condition that she withdraw her request for other privileges.

Plaintiff soon learned, however, that "under supervision" privileges were insufficient to qualify for membership in Health First, which required full privileges at an affiliated hospital. After plaintiff inquired about this criterion to Baptist, Baptist informed her that it had an "activity requirement" providing that the physician spend 30% of his/her time practicing in the Baptist radiological department over a 2-year period. Baptist explained that because of this requirement, plaintiff was not entitled to full privileges at the hospital.

2. "Attack" On Referrals. Plaintiff also presents evidence that Baptist entered into contracts with doctors, helping them equip and staff their offices, which affected those doctors' referrals to plaintiff. She provides the examples of Drs. French, Montgomery, and Westafer.[14] The figures show a reduction in referrals after the Baptist contracts,[15] but they are not indicative of any drastic drop, unlike the similar statistics for Sacred Heart. However, plaintiff alleges that plaintiff had not established strong referral sources among Baptist-affiliated doctors at the relevant time, and that Baptist's efforts inhibited increases in referrals during a period when, based on the referrals of non-affiliated doctors and the general growth of her practice, they should have been increasing.

C. Health First & Keith T. Shearlock, M.D..

Speaking for Health First, defendant Shearlock rejected plaintiff's 1985 application for membership because she did not have staff privileges at an HMO-member hospital (i.e., either Baptist or Sacred Heart). The rejection came five months after plaintiff submitted her application, which stressed her willingness to discount her prices for radiological services to levels lower than HOP currently paid.

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[14] Plaintiff has testified that Drs. Westafer and Irvin both declined to comment on the record on the subject of referrals because of fears of retaliation from Baptist and Sacred Heart.

[15] Plaintiff cites Dr. Westafer as an example, whose referrals to plaintiff fell from 70 in the year before his agreement with Baptist to 40 in the year afterwards.

Plaintiff submitted another application on June 5, 1987. Although she was scheduled to be reviewed by Health First's directors on June 16, defendant Shearlock reiterated his objection in a June 11 letter to plaintiff. He admitted at deposition that he did not have the authority to turn down plaintiff's application by himself; he explained his action by saying that he thought plaintiff's failure to meet the membership criteria regarding hospital privileges made her so obviously unqualified that it was unnecessary to take it to the full Health First Board.

At the June 16 meeting, Dr. Irvin urged plaintiff's acceptance, pointing to her offer to discount her services. The Board, however, rejected her application because of her lack of privileges at an HOP-participating hospital. The fact that plaintiff had privileges at Greenlawn and Abernathy, HOP-member hospitals located in the state of Alabama, did not change matters. Plaintiff again notes what she regards as exceptions made for others, listing 17 Health First members with staff privileges at either Greenlawn or Abernethy or other "outlying" hospitals, but not at Baptist or Sacred Heart. Shearlock explained that those doctors practiced in Alabama, not in Pensacola. Plaintiff, who practiced in Pensacola, had to have privileges at a member hospital in Pensacola --- either Baptist or Sacred Heart. Health First added this geographic requirement to its bylaws in 1985, shortly after plaintiff's first request for privileges at Sacred Heart. Plaintiff acknowledges the existence of the requirement, but (a) alleges it was added in an effort to exclude her, and (b) challenges it as an arbitrary provision.

Finally, in August 1988, plaintiff obtained radiology privileges "under supervision" at Baptist as described above.

Plaintiff's application for Health First membership was once again rejected, because Health First's bylaws required full privileges for membership. Once again, plaintiff provides evidence of exceptions to this requirement made for other physicians --- specifically, Dr. Springfield, who became a Health First member while in the process of obtaining board certification; and Dr. Epps, who became a Health First member even though she had privileges only "under supervision."[16]

D. PRC & Albert A. Post, M.D. The evidence against Pensacola Radiology Consultants, and defendant Post specifically, is somewhat less substantial than with respect to the other defendants. Essentially, plaintiff asserts that the radiology group, led by Post, took steps to cause Sacred Heart to deny plaintiff privileges as part of the overall anticompetitive conspiracy against her. There is evidence in the record that PRC opposed the granting of privileges to plaintiff, even after she made it clear that she did not wish to compete with them by actually performing radiological services at the hospital. PRC and Post argue that their opposition was rational in light of their exclusive contract with Sacred Heart, a contract which plaintiff does not, and cannot, challenge. *See Jefferson Parish Hospital No. 2 v. Hyde*, 466 U.S. 2, 104 S.Ct. 1551, 80 L.Ed.2d 2

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16 With respect to Dr. Epps, Health First rebuts with evidence that Epps fit under the exception for doctors who are "associated" with a qualified Health First member. But plaintiff denies that Epps was "associated" with the physician in question, pointing to deposition testimony in which Epps explains that she merely took emergency calls for the doctor when he was unavailable.

(1984) (exclusive contracts between hospitals and practice groups do not violate the antitrust laws).[17]

In addition, there is evidence that PRC kept computer records on the referrals made by Sacred Heart doctors. Finally, there is the testimony of Dr. Murphy, who stated that Dr. Post took part, along with Hardman and others, in the conversations in which Sacred Heart officials tried to pressure Murphy into diverting referrals from plaintiff to Sacred Heart radiologists.[18] This evidence does not relate to the privileges dispute, but it arguably supports an inference that PRC and Post were involved in the overall conspiracy.

Defendants PRC and Post cite *Todorov v. DCH Healthcare Authority*, 921 F.2d 1438 (11th Cir. 1991). In that case, plaintiff, a neurologist, brought antitrust claims against a hospital and a group of radiologists regarding the denial of the privilege to perform CT scan procedures. The Eleventh Circuit

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[17] The circumstances involving plaintiff's attempt to join PRC are similarly lacking in proof of conspiratorial intent. PRC offered plaintiff the opportunity to become an employee and eventually a stockholder of PRC, conditioned on plaintiff's abandonment of her comprehensive breast care practice, a condition plaintiff was unwilling to accept.

[18] In addition, plaintiff has testified that she was told by Carol Beem, secretary to Dr. Whitcomb, Sacred Heart's Medical Director, that Dr. Post and Dr. Whitcomb "got together and decided you don't need a privilege." This evidence is not admissible, nor given any weight, for three reasons. First, it is inadmissible hearsay. Second, Beem testified in her deposition that she had never talked with Dr. Post or anyone at the radiology group regarding Dr. Williamson's application. Third, the testimony of Beem, Whitcomb, and Post suggest that the statement, if ever uttered, was meant literally: that is, since plaintiff could visit patients at the hospital, view film, and consult with doctors without having formal privileges, such privileges were simply unnecessary.

upheld a grant of summary judgment for the defendants, on a number of grounds. Two grounds are relevant here.

First, the court held that proof that the radiologists recommended denial of the privileges, and that the hospital acted in accordance with this recommendation, is not by itself sufficient evidence of a conspiracy between the two. *Id.* at C139. However, the court also noted that there was no "additional evidence that reasonably suggests" conspiratorial conduct between the radiologists and the hospital. In this case, there is some, albeit slight, additional evidence: PRC's and Sacred Heart's practice of keeping track of referrals, and Murphy's testimony that Post participated in Sacred Heart's attempts to pressure him (and presumably other doctors) to divert referrals from plaintiff to Sacred Heart. To that extent, *Todorov* is distinct.[19]

The second relevant holding does apply to this case. The *Todorov* court also found that the plaintiff failed to make a showing that the radiologists caused the alleged injury. The court found that the hospital "unilaterally denied [plaintiff's] application for privileges; the radiologists, regardless of their desires, were not causally responsible for this decision." *Id.* at C139. This rationale applies squarely to defendants PRC and Post --- though not the other defendants, who had

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19 *Todorov* is also cited by the other defendants. The case is generally distinct. First, there was a substantial question regarding the plaintiff's medical competence to perform the requested procedures. Second, only one hospital (and a radiology group with no decision-making authority regarding privileges) was involved. Third, there was a complete absence of evidence suggesting that the hospital's asserted reason was a pretext. Fourth, the hospital had no rational economic motive for denying plaintiff privileges, other than the facially reasonable reason proffered.

decision-making authority with respect to membership or privileges. Based on *Todorov*, I must conclude that plaintiffs have not presented sufficient evidence of causation to survive summary judgment.

Count III, another count in which PRC and Post are named, alleges under Section 1 that the defendants have conspired to deny plaintiff and other independent radiologists membership in Health First. At her deposition, plaintiff admitted that she had no evidence connecting defendants Post and PRC with Health First's denial of membership status. Therefore, the causal connection here is even weaker than with respect to Count I. In fact, the only plausible means by which defendants Post and PRC could have accomplished this goal is through their asserted role in denying plaintiff Sacred Heart privileges (since privileges at either Baptist or Sacred Heart were necessary for Health First membership). Since I have determined that there is no genuine issue as to the absence of causation with respect to Count I, summary judgment for PRC and Post is also appropriate with respect to Count III.

I also find summary judgment appropriate for these defendants with respect to Count IV, the tortious interference count. Plaintiff alleges that PRC and Post intentionally and wrongfully interfered with her relationships, actual and prospective, with other doctors and patients. For the same "causation" reason articulated above with respect to the antitrust claims, this claim must fail. In *Buckner v. Lower Florida Keys Hospital*, 403 So.2d 1025 (Fla. 3d DCA 1981), for example, the court held that various individuals on the hospital staff and administration could not be held liable for tortious interference, because they could not make the ultimate decision to grant or deny plaintiff's staff privileges. *Id.* at 1028. The court

reasoned that this decision could only be made by the hospital itself acting through a composite of those defendants acting in their official capacities. *Id.* There is nothing of record which would allow a reasonable inference of interference by these defendants.

E. Generally. Finally, I discuss two factual issues which apply generally to all defendants: whether the defendants had the opportunity to conspire, and whether the defendants had a rational economic incentive to deal with plaintiff in the absence of a conspiracy.

The first issue is straightforward. The record indicates numerous connections between the defendants which support an opportunity to conspire. All of the physicians who were members of the Board of Health First were doctors practicing regularly at either Baptist or Sacred Heart. Sacred Heart officials met frequently with Baptist officials. Dr. Shearlock, President of Health First, was on the Baptist Executive Committee which first considered plaintiff's application in 1985. Dr. Baroco, President of HOP, attended the Sacred Heart Executive Committee meeting at which plaintiff's privileges request was turned down. Dr. Whibbs, a Health First Board member, served on the Sacred Heart Credentials Committee which denied plaintiff's application. Finally, Sacred Heart Administrator Hardman's appointment records show that he met frequently with a Pensacola Pathologist representative during the period prior to Michael Williamson's termination. Although evidence of an opportunity to conspire is not a prerequisite to withstand summary judgment on the Sherman Act claims, I find sufficient evidence in the record to create a genuine factual issue.

I also conclude that a genuine issue exists with respect to the existence of economic incentives for defendants to deal with plaintiff in the absence of a conspiracy. A reasonable factfinder could conclude that the hospitals had an economic incentive to admit plaintiff. In the absence of concerns regarding competency, or other valid administrative concerns, a hospital gains by the admission of physicians, in that their patients will be more likely to use its services and facilities, and it will have the benefit of their practice. Plaintiff submits physician testimony indicating that for these reasons, the hospitals rarely denied privileges. Defendants submit evidence to the contrary, leaving the matter at issue.

The same is true of Health First. Plaintiff cites internal documents of HOP and Health First indicating that both were very concerned about the high cost of radiological services. Plaintiff cites evidence from her own office indicating that her fees were lower than the fees of Health First's member radiologists. Thus, plaintiff argues, Health First had every incentive to accommodate her request for membership. But there is also evidence to the contrary.

As a general matter, summary judgment is not appropriate in fact-intensive antitrust cases. That general rule is again illustrated by this case. The sheer volume of relevant evidence submitted by the plaintiff is enough to create genuine issues of fact as to the necessary elements of her claims. Defendants have submitted equally voluminous and probative evidence on these issues. The sifting and weighing of all of this evidence must be left to the jury. Therefore, the motions are DENIED as to all remaining defendants on the antitrust claims.

IV. THE TORTIOUS INTERFERENCE CLAIMS.

Defendants also seek summary judgment on the pendent tortious interference claims. In Count IV, plaintiff alleges that defendants Sacred Heart, PRC, and Post intentionally and wrongfully interfered with existing and prospective business relationships which plaintiff had with patients at her clinic and with other doctors, and that they further interfered with prospective relationships plaintiff had with HOP patients.[20]

Tortious interference with business relationships and tortious interference with contractual relations are "basically the same cause of action" under Florida law. *Smith v. Ocean State Bank*, 335 So.2d 641, 642 (Fla. 1st DCA 1976). "The only material difference appears to be that in one there is a contract and in the other there is only a business relationship." *Id.* In order to prove a tortious interference claim, the plaintiff must demonstrate (1) the existence of a business (or contractual) relationship under which the plaintiff had legal rights; (2) an intentional and unjustified interference with the relationship; and (3) damage to the plaintiff as a result of the tortious interference with that relationship. *Ad-Vantage Telephone Directory Consultants, Inc. v. GTE Directories*, 849 F.2d 1336, 1348-1349 (11th Cir. 1987) (applying Florida law); *Tamiami Trail Tours, Inc. v. Cotton*, 463 So.2d 1126, 1127 (Fla. 1985). The relationship involved can be based on a business expectancy arising "even from an unenforceable agreement which would

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[20] I have already concluded that summary judgment must be granted to defendants PRC and Post on this claim because of the absence of any causation. This discussion applies to defendant Sacred Heart.

have been completed had the defendant not intervened." *Scussel v. Balter*, 386 So.2d 1227, 1228 (Fla. 3d DCA 1980), *citing United Yacht Brokers, Inc. v. Gillespie*, 377 So.2d 668 (Fla. 1979).

1. Whether the Interference Was Sufficiently Direct. In Florida, conduct that has only indirect consequences on a plaintiff will not support a claim for tortious interference. *See Lawler v. Eugene Wuesthoff Mem. Hospital Assoc.*, 497 So.2d 1261, 1263 (Fla. 5th DCA 1986); *Rosa v. Florida Coast Bank*, 484 So.2d 57 (Fla. 4th DCA 1986). Sacred Heart argues that the record does not support the existence of any direct interference by it with plaintiff's relationship with her patients or other doctors.

Plaintiff cites authority suggesting that the requirement of "directness" simply refers to whether the interference was intentional. I disagree. Many of the Florida cases upholding tortious interference liability emphasize a direct contact between the defendant and plaintiff's customers. *See, e.g., Ad-Vantage Telephone Directory Consultants, Inc. v. GTE Directories*, 849 F.2d 1336, 1348-1349 (11th Cir. 1987) (defendant contacted customers of plaintiff, improperly imposing additional burdens on them if they continued to deal with plaintiff); *Manuf. Research Corp. v. Greenlee Tool Co.*, 693 F.2d 1037 (11th Cir. 1982) (defendant contacted customers and employees of plaintiff with false information, which constituted direct interference); *Ins. Field Servs., Inc. v. White & White Inspection & Audit Serv., Inc.*, 384 So.2d 303 (Fla. 5th DCA 1980) (direct tortious interference found where defendants contacted plaintiff's customers to solicit their business in a wrongful manner).

Defendant Sacred Heart cites *Lawler, supra*, where the Fifth District Court of Appeal held that although a hospital's wrongful termination with plaintiff's staff privileges may have constituted interference with his doctor-patient, doctor-doctor relationships, this interference "was only an indirect consequence of the termination of [plaintiff's] staff privileges." *Lawler*, 497 So.2d at 1263. The court in *Lake Hospital & Clinic, Inc. v. Silversmith*, 551 So.2d 538, 544 (4th DCA 1989), agreed. In that case, the court emphasized that a tortious interference plaintiff must show that the defendant actually interfered with a particular doctor-doctor or doctor-patient relationship. *Silversmith*, 551 So.2d at 544. Thus, it was not sufficient to show that there was an interference with such relationships as an indirect consequence of the termination of plaintiff's staff privileges. *Id.*

Florida authority is not uniform on this point, however. Plaintiff points to *Scheller v. Am. Medical Int'l, Inc.*, 502 So.2d 1268 (Fla. 4th DCA 1987), *cert. denied*, 513 So.2d 1060 (1987),[21] where the Fourth District Court of Appeal (the same court that decided *Silversmith*) dealt with a doctor's claim that a hospital had prevented him from providing effective service to patients and other doctors by, *inter alia*, wrongfully denying him access to laboratories and billing information. The court

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[21] Defendants also cite *Am. Med. Int'l, Inc. v. Scheiler*, 462 So.2d 1 (Fla. 4th DCA 1984), *review denied*, 471 So.2d 44 (1985), an earlier stage in the proceedings of this case. This opinion is less helpful, because the analogous tortious interference claim was rejected on the distinct ground that the defendants' interference was "unsuccessful," i.e., plaintiff suffered no injury to his doctor-doctor or doctor-patient relationships.

held that plaintiff stated a valid tortious interference cause of action. *Id.* at 1271-1272.

Although Florida law on this question is not entirely clear, defendants' position seems to have the greater merit, based on the number of Florida cases in other contexts requiring some sort of direct interference by the defendant. However, summary judgment on the tortious interference claims against Sacred Heart is still not appropriate. Plaintiff also alleges interference of a direct manner: the use of economic pressure to divert referrals from plaintiff to Sacred Heart, and to coerce Pensacola Pathologists into terminating plaintiff's husband. This type of conduct clearly constitutes interference of a sufficiently direct nature to withstand summary judgment.

2. Whether Any Interference Was Justified As the Protection of Defendant's Economic Interests. In Florida, no tortious interference liability may exist where the defendant acted to protect its own legitimate economic interests. In *Genet Co. v. Anheuser-Busch Inc.*, 498 So.2d 683, 684 (Fla. 3d DCA 1986), for example, the defendant had a contractual right to disapprove the attempt by one of its wholesalers to sell a wholesalership to the plaintiff. The court, finding the defendant's disapproval of the sale to be an act to safeguard its own economic and financial interests, found that disapproval non-actionable. *Id.*

Similarly, in *Ethyl Corp. v. Balter*, 386 So.2d 1220, 1224 (Fla. 3d DCA 1980), *review denied*, 392 So.2d 1271 (Fla.), *cert. denied*, 452 U.S. 955, 101 S.Ct. 3099, 69 L.Ed.2d 965 (1981), the defendant solicited competing and superior offers to fund the reorganization of the plaintiff business, forcing the plaintiff to sweeten its own deal to the point where

its second collapse was inevitable. But the defendant, who had gained control of plaintiff's stock after it had bankrolled plaintiff's first unsuccessful attempt to stay afloat, had a vested interest in a successful reorganization: without that successful reorganization, it could not recover the money it had lent the plaintiff. The court therefore held that the defendant's actions fell under the general rule that "so long as improper means are not employed, activities taken to safeguard or promote one's own financial, [sic] and contractual interests are entirely non-actionable." *Ethyl*, 386 So.2d at 1224-1225 (emphasis added) (citing cases).

Even when acting in its own legitimate interests, a tortious interference defendant may not use "improper means." *See G.M. Brod & Co., Inc. v. U.S. Home Corp*, 759 F.2d 1526, 1535 (11th Cir. 1985) (Florida law) ; *Ahern v. Boeing Co.*, 701 F.2d 142 (11th Cir. 1983) (same).

In *Genet*, Anheuser-Busch merely exercised its contractual right to withhold approval of the sale of a wholesalership to plaintiff, protecting its interests as a manufacturer with a standing business relationship with its wholesalers. In *Ethyl*, the defendant solicited competing bids for reorganization, protecting its interest in recovering the bad loans. Neither of these methods were improper.

Ad-Vantage, *supra*, provides a useful contrast. In that case, the plaintiff was an independent advertising consultant and "selling representative," contracting with individual clients to obtain advertising space in the yellow pages published by the defendant. Plaintiff discounted the advertising rates for its clients while still paying defendant the normal rates, taking the difference out of its own commissions. When plaintiff fell

behind on the payments owed defendant, the defendant wrote directly to plaintiff's clients, explaining that (1) certain difficulties had arisen between the two; (2) that defendant would henceforth bill each advertiser directly; and (3) that future advertising orders submitted by plaintiff must be accompanied by advance payment or a guarantee of payment by the advertiser. *Id.* at 1340.

The Eleventh Circuit upheld the district court's denial of a directed verdict motion, holding that even if the defendant had a legitimate interest in collecting from the plaintiff, the jury was entitled to find that the methods used by the defendant were wrongful. *Id.* at 1349. The court concluded that there was evidence sufficient for the jury to find that the defendant's "end run" around the plaintiff was not the least damaging means of ensuring payment. The court stated that the jury could find (1) that the defendant had no contractual right to deal directly with the plaintiff's customers; (2) that such direct dealing was not the usual practice within the industry; and (3) that the defendant chose a "particularly devastating way to obtain its money ... a way calculated to damage Ad-Vantage's business relationships." *Ad-Vantage*, 849 F.2d at 1349.

In this case, a reasonable factfinder could find that defendant Sacred Heart deliberately exerted economic pressure upon other doctors to divert referrals from plaintiff and to terminate plaintiff's husband, all for the purpose of destroying or limiting plaintiff's competing practice. Regardless of the extent to which any opposition to plaintiff's privileges, use of the needle placement procedure, etc., were legitimate concerns in protection of defendants' own economic interest, a jury could reasonably determine these methods to be improper. Summary judgment is inappropriate on this ground as well.

V. CONCLUSION.

For the reasons set out above, summary judgment is GRANTED as to defendants PRC and Post as to Counts I, III, and IV. As to all other defendants and counts, the motions for summary judgment are DENIED.

DONE AND ORDERED this 27th day of December, 1991.

ROGER VINSON
United States District Judge

SUPREME COURT, U.S.
FILED

(3) 941707 APR 12 1995

No. OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1994

ANGEL YUH WILLIAMSON, M.D.,
PENSACOLA DIAGNOSTIC & BREAST CLINIC, P.A.,

Petitioners,

v.

SACRED HEART HOSPITAL OF PENSACOLA,
BAPTIST HOSPITAL, INC.,
PENSACOLA RADIOLOGY CONSULTANTS, P.A.,
ALBERT A. POST, M.D. and
KEITH T. SHEARLOCK, M.D.,
HEALTH FIRST NETWORK, INC.,

Respondents.

Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI
Volume II

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

ANGEL YUH WILLIAMSON, M.D., and
PENSACOLA DIAGNOSTIC CENTER
& BREAST CLINIC, P.A.

Plaintiffs,

v. CASE NO. 89-30084-RV

SACRED HEART HOSPITAL OF PENSACOLA;
BAPTIST HOSPITAL, INC.; PENSACOLA
RADIOLOGY CONSULTANTS, P.A.; ALBERT
A. POST, M.D.; KEITH T. SHEARLOCK,
M.D.; and HEALTH FIRST NETWORK, INC.,

Defendants.

_____/

ORDER

Defendants Sacred Heart Hospital of Pensacola ("Sacred Heart"), Baptist Hospital, Inc. ("Baptist"), Health First Network, Inc., and Keith T. Shearlock, M.D. all have moved for reconsideration of this court's order of December 27, 1991, denying their several motions for summary judgment. (doc. 332). Upon consideration of the motions and the memoranda of the parties, the evidence in the record, and the argument of counsel at the hearing held in this matter, I have concluded that further amplification of the factual record is necessary, and that, in turn, requires a number of revisions in the legal analysis set

out in my earlier order. Accordingly, these motions are GRANTED and my order of December 27, 1991, is vacated and set aside, and this order is substituted therefor. Except as noted, the material facts are not in dispute.

I. BACKGROUND

A. DR. WILLIAMSON AND PENSACOLA DIAGNOSTIC CENTER & BREAST CLINIC

Plaintiff Angel Yuh Williamson, M.D. is a board certified radiologist. In May 1984, Dr. Williamson formed, and has been the sole owner of, plaintiff Pensacola Diagnostic Center & Breast Clinic, P.A. ("Pensacola Diagnostic"). Pensacola Diagnostic is an outpatient radiology clinic located in Pensacola, Florida. While it provides general radiological services, it specializes in the area of comprehensive breast care.[1] In particular, Pensacola Diagnostic places special emphasis on the detection and diagnosis of breast cancer.

In 1984, Pensacola Diagnostic was unique. In the traditional approach to breast care, a patient would see a primary care physician such as a family practitioner or an obstetrician/gynecologist. The primary care physician then would refer the patient to a radiologist for a mammogram. The patient would go to the hospital with which the radiologist was

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[1]Since Dr. Williamson is the sole owner of Pensacola Diagnostic, I will frequently refer to both as "the plaintiff" for brevity purposes. As a practical matter, their interests are identical.

affiliated, and a radiology technician would perform the mammogram. The radiologist would read and interpret the mammogram and send a written report to the primary care physician for consultation regarding any further action.

In contrast, Dr. Williamson, through her clinic, does not utilize the hospital radiology departments and emphasizes patient consultation and education. Normally, Dr. Williamson's patients are referred to her by their primary care physician.[2] Dr. Williamson then consults with the patient, performs the mammogram or other diagnostic procedures at her clinic, interprets the results there, and discusses them with the patient. She then makes a written report to the primary care physician.

When the results of a particular diagnostic test reveal the need for further treatment or hospitalization, it is still the referring primary care physician or a surgeon who provides the treatment or admits the patient to the hospital. Thus, even though Dr. Williamson was on the staff of the University Hospital in Pensacola from shortly after arriving here in 1983,

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[2]Defendants claim that plaintiff's patient logs show that, from 1984 and 1989, only 7% to 15% of Pensacola Diagnostic's business consisted of "self-referrals", i.e. patients who come directly to plaintiff for breast care. In such case, plaintiff would perform diagnostic functions, and then would refer the patient to a physician or surgeon if further care was necessary. Plaintiff claims that self-referrals accounted for approximately half of her business.

she never admitted a patient to that hospital. It is now closed. Similarly, between the time she obtained courtesy privileges at defendant Baptist Hospital in 1988, and the taking of her deposition in October 1989, Dr. Williamson visited only three patients there. During these visits, she consulted with the patients and their families by giving them medical advice, but did not prescribe treatments or make entries on their hospital charts.[3]

Since it began operations in 1984, Pensacola Diagnostic has enjoyed continuous growth. Dr. Williamson opened Pensacola Diagnostic by herself with three employees. As of October 1989, there were nine full-time employees. As of early 1991, Pensacola Diagnostic maintained approximately 10,000 to 11,000 patient files. The work load at her clinic is such that, for the last several years, Dr. Williamson has been exploring the possibility of adding another radiologist to her practice.

Dr. Williamson and Pensacola Diagnostic have also enjoyed a steady increase in income. Clinic revenue has increased every year, growing from $187,881.00 in the fiscal year ending April 30, 1985, to $670,996.27 for the first eleven months of the fiscal year ending April 30, 1990. During the

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[3]At least one of these patients was a "self-referral" for whom Dr. Williamson was acting as the "primary care" physician. Accordingly, she referred the patient to a surgeon who then admitted the patient to Baptist. Since receiving her privileges at Baptist, Dr. Williamson has not attempted to admit any patients there. Nor has she ever admitted any patient to any hospital where she has privileges.

same period, Williamson's annual salary and benefits package increased in value from $45,139.00 to over $250,000.00.

B. DR. WILLIAMSON'S ATTEMPTS TO GAIN PRIVILEGES AT SACRED HEART AND BAPTIST.

1. The 1984 Applications

(a) Sacred Heart, Pensacola Radiology Associates and Albert A. Post, M.D.

In November 1984, shortly after opening Pensacola Diagnostic, Dr. Williamson sought staff privileges in the Departments of Radiology at defendant Sacred Heart Hospital of Pensacola ("Sacred Heart") and at defendant Baptist Hospital, Inc. ("Baptist"). Defendant Sacred Heart is a non-profit corporation engaged in the business of providing full service health care in the Pensacola, Florida, area.[4] At the time Dr. Williamson submitted her application, Sacred Heart had an exclusive contract with defendant Pensacola Radiology Consultants, P.A. ("PRC") for the provision of radiological services at the hospital.[5] Defendant Albert A. Post, M.D. is

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[4]Pensacola and the bordering communities of Cantonment, Gulf Breeze and Milton account for 82% of Sacred Heart's patients.

[5]Defendant Albert A. Post, M.D. is a radiologist and a shareholder in PRC. He also is chairman of Sacred Heart's radiology department. Dr. Post's partners in PRC, S. Randall Hobgood, M.D., William R. Balchunas, M.D., and Anthony J. DeRaimo, M.D., all were originally named as defendants in plaintiff's complaint. They all have been dismissed with

PRC's founder and president, and is also the chairman of Sacred Heart's Department of Radiology.

Section 7.1 of Sacred Heart's "Credentialling Procedures Manual of the Bylaws, Rules and Regulations of the Medical and Dental Staff" sets out an "exclusivity policy" that specifically provides for this type of contract. According to the bylaws, certain hospital facilities and services, including radiology, are designated to be used on an exclusive basis in accordance with contracts between the hospital and qualified practitioners. Applications for initial appointment or for clinical privileges related to those hospital facilities and services under exclusive contract cannot be accepted for processing unless they are submitted in accordance with an existing or proposed contract with the hospital.

Upon receiving Dr. Williamson's application, Sacred Heart's medical director, John Whitcomb, M.D., consulted with Dr. Post. During their discussion, Dr. Post stated that, in his view, the exclusive contract with PRC prohibited Dr. Williamson from practicing radiology at Sacred Heart. Therefore, he questioned whether the hospital could grant the requested privileges.[6] There was some further discussion as to what services Dr. Williamson sought to render, and Dr. Post noted that the hospital routinely granted courtesy rights to non-staff physicians who merely wanted to view films or to visit and consult with their patients.

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prejudice by stipulation of the plaintiffs. (Doc. 264).

[6] S. Randall Hobgood, M.D., another of PRC's physician partners, expressed similar concerns to Dr. Whitcomb.

What exactly happened to Dr. Williamson's application at this point is unclear. Dr. Whitcomb admits having made no immediate effort to process it through regular channels.[7] At the same time, S. Randall Hobgood, M.D., another of PRC's partners, admits having questioned the propriety of granting Dr. Williamson's request for privileges in the face of the exclusive contract with PRC. In addition, there also is evidence that, during a conversation with David Allen Cross, M.D., a local surgeon, Dr. Post questioned the quality of Dr. Williamson's equipment, as well as her competency as a radiologist.

It is undisputed that Dr. Williamson frequently telephoned Dr. Whitcomb's office concerning her application. In particular, on February 8, 1985, Dr. Whitcomb's administrative secretary, Carol Beem, telephoned Dr. Williamson's office and told her secretary that Dr. Whitcomb and Dr. Post had discussed her application, and had concluded that she would not need privileges.

Dr. Williamson claims to have understood Ms. Beem's remarks to mean that Drs. Whitcomb and Post had decided that she did not need privileges "in order to properly care for her patients," and therefore, that her application was no longer being considered for approval. Dr. Williamson felt that such patient care decisions were hers alone to make.[8] Of course,

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[7] Indeed, given the wording of the bylaws, it is doubtful whether Dr. Whitcomb had authority to process the application.

[8] PRC and Dr. Post correctly point out that Dr. Williamson's description of her conversation with Ms. Beem is inadmissible hearsay as to them. However, PRC and Dr. Post have based their motion in part on the deposition testimony of Dr. Whitcomb in which he admits both that his office was

Sacred Heart contends that Ms. Beem merely explained Dr. Post's conclusion that, because of the standard courtesies extended to non-staff physicians, Dr. Williamson would not need privileges "to visit patients or to view the results of tests."[9]

On February 12, 1985, Dr. Whitcomb followed up this phone conversation with a letter in which he advised Dr. Williamson that the Executive Committee had discussed "what kind of privileges could be offered to [her] since we do have a closed contract situation for radiology." He then informed her that the Committee had concluded that she would not need privileges to visit her patients or to see the results of their tests. Dr. Whitcomb also offered to continue processing Dr. Williamson's application, stating that, if accepted, she would be afforded staff membership rights without radiology procedure or interpretation privileges.

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in contact with Dr. Williamson during this time period, and that Ms. Beem did have a conversation with Dr. Williamson, the substance of which was substantially as alleged by plaintiffs. Thus, I reiterate that the fact of the phone call and the essentials of its content are not in dispute as to either Sacred Heart or PRC and Dr. Post. The only dispute over the conversation relates to interpretation of Ms. Beem's statement that Dr. Williamson "did not need privileges".

Oddly, Dr. Williamson has submitted an excerpt of Ms. Beem's deposition testimony, in which she confirms Sacred Heart's interpretation of the conversation, i.e. Ms. Beem told Dr. Williamson she would not need privileges because the radiology department would extend her the courtesy of visiting her patients and viewing their films.

9 In the original order, I determined that this conversation was hearsay. However, upon further reflection, it appears to be an adopted admission under Federal Rule of Evidence 801(d)(2)(B), and if so, not hearsay.

Dr. Whitcomb's letter is the only evidence that the Executive Committee actually met and discussed Dr. Williamson's application.[10] In any event, on February 13, 1985, Dr. Williamson requested that Sacred Heart continue processing her application for staff membership. Subsequently, Dr. Williamson received several requests from Carol Beem for additional information regarding her education and references.

On April 4, 1985, Dr. Whitcomb again wrote Dr. Williamson and stated that he had begun the procedure of verifying her license and other qualifications, but that, contrary to his letter of February 12, he could not process her application for staff membership only. He explained that the Credentialling Procedures Manual required that each application for appointment to the medical staff contain a request for specific clinical privileges. Since the exclusive contract with PRC prevented Sacred Heart from granting privileges in the Department of Radiology, it could not process Dr. Williamson's associated request for appointment to the medical staff.

On April 15, 1985, Dr. Williamson wrote back to Dr. Whitcomb and explained that she did not wish to work in the radiology department, and that she only wanted to be able to admit her clinic patients and attend to their general care.[11]

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[10] Though Sacred Heart has attached to its motion for summary judgment the minutes of other Executive Committee meetings in which plaintiff's application was discussed, the minutes of this meeting are absent.

[11] Dr. Williamson claims that, at this time, independent radiologist Thomas Brown, M.D. had privileges at Sacred Heart even though he was not then a member of PRC. Sacred Heart points out, however, that, at one time, Dr. Brown was associated with PRC. After he severed this relationship, Dr. Brown did remain a member of the Sacred Heart staff, but was not permitted to furnish radiology services or exercise clinical privileges. Dr. Brown resigned from the

This letter also alludes to several telephone conversations with Dr. Whitcomb's office during which Dr. Williamson allegedly explained the precise nature of the services she wanted to perform at the hospital.

On April 17, 1985, Dr. Williamson met with the Credentials Committee to discuss her unique request. Once again, she stated that she did not want to practice diagnostic radiology, but only wanted to be able to provide continuing care to her clinic patients. She explained that the provision of such care required that she have the privilege of admitting patients as the attending physician, that she be able both to consult with them during their stay, and to order clinical tests and patient care.

The Credentials Committee considered her request, but determined that the exclusive contract with PRC prevented them from recommending approval of her application for membership in the Department of Radiology as a radiologist.[12] Instead, the Committee, along with Dr. Whitcomb, suggested that Dr. Williamson apply for staff membership and Level I privileges in either the Department of Family Practice or the

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staff in December 1985, and has not had staff privileges since then.

12 Only the Board of Directors can grant staff membership and privileges. Under the normal procedure, an application for medical staff privileges is reviewed first by the Credentials Committee. After examining the applicants qualifications and receiving input from the relevant medical department, the Credentials Committee makes findings as to the applicant's qualifications and recommends either approval or denial. It then passes the application on to the Executive Committee of the Medical and Dental Staff for review. After making its own recommendation, the Executive Committee passes the application on to the Board of Directors of Sacred Heart Hospital for final action.

Department of Internal Medicine. Dr. Williamson agreed to amend her application, and the committee provided her with a copy of the Bylaws, Rules and Regulations of the Medical and Dental Staff setting out the staff membership and privilege eligibility requirements for all the medical departments at the hospital. They also provided her with copies of proposed amendments to the Rules and Regulations of the Departments of Medicine and Family Practice then under consideration by the hospital. Because Dr. Williamson later withdrew her application for privileges in the Department of Family Practice, it is not at issue in this case. Therefore, I will refer only to her application for privileges in the Department of Internal Medicine.

The bylaws in effect at the time Dr. Williamson submitted her original application provided for four categories of privileges in the Department of Internal Medicine. Category I privileges allowed the physician to "render emergency care and care of the most preliminary nature. Further management must then be provided by an appropriately qualified physician." To be eligible for such privileges, the physician had to have completed one year of postgraduate clinical training.

In the fall of 1984, shortly before Dr. Williamson submitted her application, the Department of Internal Medicine began the process of amending its departmental Rules and Regulations.[13] The proposed rule changes would create a

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13 In addition to matters of general concern, the Bylaws of the Medical and Dental Staff of Sacred Heart Hospital contain the Rules and Regulations for each medical department within the hospital. The delineation of privileges for a particular department is listed within the "Rules and Regulations" pertaining to that department. Subject to the approval of the Bylaws Committee, the Executive Committee, the General Staff and the Board of Directors, each

three-tiered system of privileges wherein "Level I" privileges would require the least amount of medical expertise, and "Level III" privileges would require the most expertise.[14]

From as early as October 23, 1984, the proposed rules defined "Level I" privileges to permit the physician "to treat mild, uncomplicated illnesses or disorders. Should the patient's medical condition progress to an acute or unstable phase, consultation by a member of the Department with Level III privileges is required." The proposed eligibility requirements for "Level I" privileges added the words "in a medically oriented specialty" to the existing requirements. Thus, as proposed, the rules included the phrase: "To be eligible for Level I privileges, the physician must provide evidence of satisfactorily completing one year of approved postgraduate clinical training in a medically oriented specialty."[15]

On March 11, 1985, the Bylaws Committee approved the Department of Internal Medicine's proposed rule changes and passed them on to the Medical Executive Committee. On

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department has the power to adopt its own Rules and Regulations.

[14] Amending the bylaws to incorporate the rules changes was a four-step process. First, the department changing its rules drafts a proposed rule. The Bylaws Committee then reviews the proposed rule and makes any changes it deems appropriate. Next the proposed rule goes before the Executive Committee for input from the administration. If the Executive Committee makes any changes, the proposed rule goes back to the department for review, and the process starts over. Once the Executive Committee approves the rule, the general staff votes on it. Finally, if the general staff approves the change, it is submitted to the Board of Directors for final approval and incorporation into the bylaws.

[15] Both definitions appeared in the minutes of an October 23, 1984, Department of Internal Medicine monthly meeting and remained unchanged throughout the amendment process.

March 26, 1985, several weeks before Dr. Williamson's April 17 meeting with the Credentials Committee, the Medical Executive Committee approved these amendments without change. In the version of the proposed rule that the general staff considered at its regular meeting of May 28, 1985, the words "primary care" appeared before the words "medically oriented specialty." Thus, the proposed rule then read:

> To be eligible for Level I privileges, the physician must provide evidence of satisfactorily completing one year of approved post-graduate clinical training in a *primary care* medically oriented specialty. (emphasis added)

This addition is not reflected in the minutes of any committee meeting.[16] Nevertheless, the general staff approved the amendment as presented and passed it on to the Board of Directors for their approval.

The change is significant insofar as it concerns Dr. Williamson's pending application. After finishing medical school, Dr. Williamson completed a one year residency in nuclear medicine. It is undisputed that nuclear medicine has been recognized by the AMA since 1971 as a "medically

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16 This wording does appear in a copy of the bylaws plaintiff has submitted in support of her opposition to defendants' original motions for summary judgment. (*See* App. III to plaintiff's opposition at p. 213-14). This copy is dated March 1985. Another copy of the bylaws bearing the same date, and also submitted by the plaintiff, does not include the words "primary care" before "medically oriented specialty". (*See Id.* at 158-59).

oriented" specialty. However, it is not a "primary care medically oriented" specialty.[17]

At the Board of Directors meeting on July 19, 1985, Dr. Whitcomb presented the revised Rules and Regulations for the Department of Internal Medicine and, in the words of the Board's minutes, "highlighted the levels of privileges, eligibility requirements, and supervision requirements." The Board then adopted the proposed rules without change.

On July 17, 1985, two days before Board approval of the revised eligibility requirements, Dr. Whitcomb sent a memo to the Credentials Committee in which he stated that Dr. Webb, the Chairman of the Department of Internal Medicine, had reviewed Dr. Williamson's credentials and concluded that she failed to meet the minimum requirements for the granting of Level I privileges within his department. Accordingly, Dr. Webb recommended that Dr. Williamson's applications for medical staff membership and privileges be denied. In accordance with Dr. Webb's evaluation of her medical qualifications, the Credentials Committee concluded at its July

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17 Dr. Williamson also had completed a three year residency in diagnostic radiology. During that residency, she rotated through the different sections of diagnostic radiology including angiography and interventional radiology. During these rotations, Dr. Williamson visited patients prior to performing the necessary procedures, and discussed with them the procedures and the associated risks. She issued premedication orders and post procedure orders on these patients including antiocoagulant or other medications required for the procedures. Most of the patients with whom Dr. Williamson dealt during her residency were referred to radiology for specific procedures by the admitting physician. However, in those cases where patients were admitted to the hospital by the radiology staff, the residents participated in taking medical histories and administering physical exams.

17 meeting that Dr. Williamson did not qualify for privileges in the Department of Internal Medicine.

In lieu of recommending the outright rejection of her application, the Credentials Committee voted to request the Department of Radiology to consider accepting Dr. Williamson in the Department of Radiology "Courtesy Staff, with consultant privileges." The committee defined consultant privileges as "being available for consultation [with] other physicians or patients, to permit patient interaction within the hospital, but without the privilege to give official readings of x-rays or radiological procedures and without the privilege to write orders."

This recommendation notwithstanding, the Executive Committee of the Medical and Dental Staff determined at its July 23, 1985, meeting that the exclusive contract with PRC precluded the hospital from offering any type of privileges in the Department of Radiology. The Executive Committee also determined that Dr. Williamson's lack of clinical experience precluded granting privileges in the Department of Internal Medicine. Accordingly, the committee voted to recommend to the Board of Directors that it deny Dr. Williamson's applications.

As the Chairman of the Department of Radiology, Dr. Post did serve on the Executive Committee, and was present at this meeting. However, Dr. Post claims to have abstained from making any comments about Dr. Williamson, and there is no evidence to the contrary. Neither Dr. Post nor any other physician associated with PRC otherwise played any

role in the processing of Dr. Williamson's application.[18] One member of the Executive Committee did vote against a negative recommendation, but this physician is not identified.

Under the "Fair Hearing Plan" of the Medical Staff By-laws, a physician who receives an adverse recommendation from the Executive Committee is entitled to an opportunity to show, by clear and convincing evidence, that the adverse recommendation was arbitrary, capricious, or unreasonable. On July 30, 1985, Dr. Williamson requested a hearing on the Executive Committee's adverse recommendation. A hearing was set for September 17, 1985, but was postponed at Dr. Williamson's request. The Executive Committee then rescheduled the hearing for November 5, 1985, but Dr. Williamson again requested that it be postponed. On November 25, 1985, Dr. Whitcomb wrote Dr. Williamson to ask that she submit a tentative date for rescheduling the hearing. Dr. Williamson did not respond, and there was no further discussion of her application for approximately two and one-half years. Thus, the application was considered to be abandoned.

(b) Baptist Hospital

Defendant Baptist Hospital, Inc. ("Baptist") also is a nonprofit corporation engaged in the business of providing full service health care in the Pensacola, Florida, area.[19] Dr. Williamson's concurrent attempt to attain privileges at Baptist is similar to her efforts at Sacred Heart.

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[18] "None of the radiologists sits on the Credentials Committee.

[19] Pensacola and the bordering communities of Cantonment, Gulf Breeze, and Milton account for 88.88% of Baptist's patients.

Pursuant to an oral agreement, Radiology Associates of Pensacola ("Radiology Associates") had been providing radiology services at Baptist from the time the hospital opened in 1951. The specifics of this agreement were very vague. At the time Dr. Williamson submitted her application, some of the physicians practicing with Radiology Associates did not even realize that the contract was exclusive. Similarly, over the years several exceptions had been made, most notably for perinatologists performing fetal ultrasound, and neurologists performing CT scans.[20]

In the summer of 1984 - - - well before plaintiff submitted her application for privileges - - - Baptist's Board of Directors directed the hospital administration to reduce the Radiology Associates contract to writing. Discussions regarding the written contract continued through the winter, and the contract was executed on June 28, 1985.

In the meantime, Dr. Williamson contacted Baptist in November 1984, and requested an application for medical staff membership and privileges in the Department of Radiology. On December 7, 1984, John N. Robbins, Baptist's administrator, responded with a letter explaining that the hospital was then negotiating a written contract with Radiology Associates for the provision of radiology services. Robbins informed Dr. Williamson that, in view of these negotiations, Baptist would be unable to consider an application for privileges in radiology from a physician who was not affiliated with Radiology Associates.

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20 As described more fully below, at one time radiologists performed fetal ultrasound. Gradually, responsibility for performing the Procedure shifted to obstetricians and perinatologists. This is now the standard practice.

In April, Dr. Williamson contacted Baptist and, as with Sacred Heart, explained that she did not wish to practice diagnostic radiology. She informed Baptist that she only desired privileges sufficient to allow her to admit patients, and to provide continuing care to those patients she had treated at her clinic, but who had been admitted to Baptist by other physicians. In a letter to Thomas B. Williams, M.D., the president of Baptist's medical staff, dated May 6, 1985, Dr. Williamson reiterated her desire and stated that she had discussed the matter with Radiology Associates and had made it quite clear to them that she had no intention of practicing radiology at Baptist.[21] Subsequently, on May 13, 1985, Baptist forwarded an application and a copy of the hospital bylaws and rules and regulations to Dr. Williamson.

Dr. Williamson submitted her application on or about May 28, 1985. On June 4, 1985, the Executive Committee met, and although there is no evidence that Radiology Consultants objected to Dr. Williamson's application, it concluded that, although she was qualified for privileges in diagnostic radiology, the exclusive contract then being negotiated would preclude her from practicing her specialty at Baptist. The minutes of the Committee's meeting reveal that it recognized that Dr. Williamson did not want to practice radiology. However, after much discussion, it was agreed "that

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[21] In their depositions, Wiley Howard Cooper, M.D. and William R. Bender, M.D., both of whom are principals in Radiology Associates, stated that the P.A. had no objection to Dr. Williamson obtaining staff membership at Baptist as long as she did not practice diagnostic radiology at the hospital. According to Drs. Cooper and Bender, both John Robbins, Baptist's chief administrator, and Spencer Mitchum, the hospital's attorney, told the physicians of Radiology Associates that the hospital considered the issue of medical staff membership separate from the issue of privileges.

the Medical Staff Bylaws do not appear to provide for granting privileges such as she is requesting, since it appears that with her training she would be eligible only for privileges in radiology and the Executive Committee does not perceive a need to amend the bylaws to change this."

Nevertheless, hospital policy required the Committee to consider the issue of privileges separately from the issue of the exclusive contract.[22] In other words, the exclusive contract with Radiology Associates would not prevent Dr. Williamson from obtaining privileges at Baptist merely because she was a radiologist. If she could show that she otherwise qualified under the bylaws for privileges in an area not covered by the exclusive contract, the Committee would recommend approval of her application. Accordingly, by letter dated July 8, 1985, Dr. Williams explained the Executive Committee's dilemma

> From information submitted, it would appear that under our bylaws your qualifications if acceptable would be only in the specialty of

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22 In her memorandum, plaintiff consistently mischaracterizes the nature of this policy, relying on a statement by counsel for Baptist at the deposition of Wiley Howard Cooper, M.D. to the effect that the Board of Directors had adopted a policy of keeping the issue of privileges separate from the issue of exclusive contracts. Plaintiff argues that Baptist had a policy that would have allowed the Executive Committee to grant limited privileges in the Department of Radiology so long as she promised not to practice diagnostic radiology at the hospital.

The plain language of plaintiff's own evidence belies this interpretation. First, the Medical Staff Bylaws make no provisions for such partial privileges. Second, the minutes of the June 4 Executive Committee meeting clearly show that it was willing to grant Dr. Williamson privileges in a manner that was consistent with both the Bylaws and the exclusive contract. As discussed in the text, it subsequently wrote her a letter inviting her to explain her qualifications in an area not covered by the exclusive contract.

> Diagnostic Radiology. Further, as you have been advised, you will not be able to practice Diagnostic Radiology in Baptist Hospital because of the exclusive contract the hospital has with Radiology Associates of Pensacola.
>
> * * *
>
> With these constraints, there is almost nothing that you can do at Baptist Hospital with your present qualifications. Therefore, it appears to us that membership on our Medical staff would be of no benefit to you. If you disagree with this conclusion, please advise us specifically and in detail what it is that you wish to do at Baptist Hospital that is allowed under the Rules and Regulations applicable to Diagnostic Radiology and not precluded by the exclusive contract which we have with Radiology Associates of Pensacola. We will hold your application pending our receiving your reply to this correspondence. If it can be determined that there is any meaningful practice in Diagnostic Radiology open to you at Baptist Hospital, we will be happy to proceed with processing your application.

Dr. Williamson claims that, because she felt that she already had provided the requested information, she interpreted Dr. Williams' letter as a denial of her application. At this point, Dr. Williamson also abandoned her application to Baptist for approximately two and one-half years.

2. Dr. Williamson's First Application For Membership in Health First

While her applications were being processed at Sacred Heart and Baptist in 1984 and 1985, Dr. Williamson also was seeking membership in defendant Health First Network, Inc. ("Health First"). Health First is an "independent physician's association", and it is the sole authorized provider of health care for members of a health maintenance organization ("HMO") known as Health Options of Pensacola ("HOP"). HOP is jointly and equally owned by Health First; Blue Cross/Blue Shield of Florida; Gulf Coast Diversified, Inc., an affiliate of defendant Sacred Heart; and BCI Enterprises, Inc., an affiliate of defendant Baptist.

As originally drafted, Health First's bylaws provided that, at a minimum, a physician applying for membership

> (2) shall have been granted permanent admitting or clinical privileges or other major privileges, without supervision, by at least one Participating Hospital, and shall not have had any such privileges suspended, revoked, or otherwise terminated at any hospital anywhere.[23]

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[23] The remaining included minimum credentialling criteria required that applicants:

> (1) shall at all times be licensed to practice allopathic or osteopathic medicine within the State of Florida;
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> * * *

The bylaws defined "Participating Hospital" as a "participating provider that is a hospital." At the time the bylaws were drafted in early 1985, the only participating hospitals were Sacred Heart and Baptist. Later, Gulf Breeze Hospital became a participating hospital.

Shortly after HOP became operational on August 1. 1985, it decided to expand its operation to areas outside Pensacola. Accordingly, in late 1985, HOP added several outlying hospitals to the organization. At the same time, it requested that Health First correspondingly admit physician providers from these areas. To encourage physician participation outside of the Pensacola area, Health First waived the requirement that all members buy an $8500.00 share of stock in the Health First corporation.

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(3) shall not have been denied membership in the American Medical Association or any state or county medical association or society;

(4) shall at all times be and have been in compliance with the Current Opinions of the Judicial Council of the American Medical Association;

(5) shall have made no act or omission which tends to disrupt the operation of the business of [Health First] or any Physician Provider;

(6) shall at all times maintain professional malpractice liability insurance satisfactory to the Board; and,

(7) shall be in compliance with all provisions of these Medical Staff Bylaws, the Bylaws of [Health First], any applicable Physician Provider Agreement, and any other rules, regulations, policies and procedures of the Staff or [Health First].

Health First also amended its credentialling criteria to permit physicians who practiced primarily in the outlying areas to qualify for membership in Health First, and hence HOP, by obtaining privileges at an outlying participating hospital. At the same time, Health First retained the requirement that physicians practicing primarily in Pensacola obtain privileges at a hospital affiliated by ownership or control with the hospital owners of HOP. At the time, the only such hospitals were Baptist, Sacred Heart, Gulf Breeze Hospital and Jay Hospital.[24]

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24 The new credentialling criteria provided that an applicant

> (2) shall have been granted or shall be actively seeking or making progress toward obtaining, permanent admitting or clinical privileges or other major privileges, without supervision, by at least one Participating Hospital (which must be an affiliated hospital if the Applicant practices primarily within the central portion of the service area), and shall not have had any such privileges suspended, revoked, or otherwise terminated at any hospital anywhere . . .

A "participating hospital" still was defined as a "Participating Provider that is a hospital," and included the newly recruited hospitals. However, "Affiliated Hospital" means

> Sacred Heart Hospital or Baptist Hospital of Pensacola, Florida, or any other Participating Hospital . . . directly or indirectly associated by ownership or control with Gulf Coast Diversified, Inc. or Mobile Diagnostics, Inc., which are the two hospital related Florida corporations that are stockholders in Health Options of Pensacola, Inc.

"Central portion of the service area" is not defined in the bylaws, but it is undisputed that the term refers to the greater Pensacola area, including Escambia, Santa Rosa, Okaloosa Counties, along with parts of Walton County, Florida.

Dr. Williamson initially inquired into membership in Health First by telephone on May 20, 1985. At that time she spoke to Health First's president, defendant Keith T. Shearlock, M.D.[25] Dr. Shearlock explained that, in order to become a member of Health First, its bylaws required that physicians practicing in the greater Pensacola, Florida, area first obtain staff membership and associated privileges without supervision at Sacred Heart or Baptist. Since Dr. Williamson did not have privileges at either hospital, Dr. Shearlock told her that she would not be eligible for membership.

In response, Dr. Williamson wrote to Health First's Medical Director, Paul T. Baroco, M.D., requesting a waiver of the privileges requirement. In her letter, which was dated September 30, 1985, Dr. Williamson set out her qualifications, and explained that because of the exclusive contracts at Baptist and Sacred Heart, she was not eligible for radiology privileges. She also offered to discount her fees in exchange for a waiver.

Dr. Baroco passed this letter on to Dr. Shearlock, who responded by letter on February 9, 1986. In this letter, Dr. Shearlock simply stated that "one must have major staff privileges at either Baptist or Sacred Heart Hospital to be eligible as a physician provider. It is my understanding that you have not achieved that status and therefore there is no opportunity to offer you a contract as a physician provider."

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[25] Defendant Keith Shearlock, M.D. is a nephrologist (a kidney specialist). It is undisputed that Dr. Shearlock does not compete with Dr. Williamson, and that, as a nephrologist, he would not refer patients to a radiologist such as Dr. Williamson.

Dr. Shearlock rejected Dr. Williamson's inquiry without supplying her with an application or discussing her request with the Health First Board of Directors (which also functions as the credentialling committee). Dr. Shearlock stated that, as Health First's president and only administrative employee, he felt it was within his purview to screen applications in order to determine whether the applicant met the threshold requirements for membership. Since it was clear that Dr. Williamson did not have the appropriate privileges, Dr. Shearlock stated that he felt it unnecessary and wasteful to continue processing her application.

3. Dr. Williamson's Negotiations With PRC

While her various applications were pending, and even after they had been rejected, Dr. Williamson was attempting to negotiate an employment contract with PRC. At this same time, Sacred Heart was laying the groundwork for the creation of its own women's health care clinic. During the preliminary planning stages, and in conjunction with the Williamson/PRC negotiations, there was some discussion of Sacred Heart buying Dr. Williamson's equipment and making her the radiologist for the proposed clinic.

In the context of the parties' negotiations, it is clear that Dr. Williamson viewed joining PRC and operating the proposed Sacred Heart clinic as akin to a corporate merger. Consistent with this view, Dr. Williamson envisioned joining PRC as a shareholder and combining her assets, i.e. her clinical expertise, equipment and substantial client files, with those of PRC to form a single entity.

In contrast, PRC wanted Dr. Williamson to join the group as an employee, with the possibility of shareholder status in two years. In mid-August 1986, PRC in fact offered Dr. Williamson such a proposed contract in writing. However, by her own admission, Dr. Williamson was not interested in doing "hospital radiology." In particular, she did not want to be "on call" at night or on weekends. Apparently, PRC was willing to accommodate Dr. Williamson's scheduling request in exchange for a 25% decrease in salary, but Dr. Williamson rejected this arrangement.

The proposed contract also contained a non-compete clause forbidding her to practice medicine in Escambia and Santa Rosa Counties for two years if she should separate from the group. Finally, it contained a termination clause that would have allowed PRC to terminate Dr. Williamson without cause upon 90-days' notice. Dr. Williamson had severe misgivings about the inclusion of these clauses. PRC, however, refused to change them, as they are commonly utilized. As a result, negotiations broke down, and on October 3, 1986, PRC withdrew its offer.[26]

The withdrawal of PRC's offer also eliminated the possibility of Dr. Williamson playing a part in the operation of Sacred Heart's proposed women's center. After discussions with PRC, the Ad Hoc Committee on the Women's Center had determined as early as January of 1986 that the creation of its

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[26] Plaintiff's clinic operated on a regular "9 to 5" type business schedule, and Dr. Williamson did not work nights or weekends. In addition, plaintiff's own figures show that association with PRC would have resulted in a decrease in her income.

own women's center and a formal relationship with Pensacola Diagnostic were mutually exclusive alternatives.[27]

After the negotiations between PRC and Dr. Williamson ended, Sacred Heart completed its plans for a free-standing women's center on the Sacred Heart grounds. In March of 1987, the Ann L. Baroco Center for Women's Health ("Ann Baroco Center") opened its doors. Located adjacent to Sacred Heart, the Center offers a broad range of services, including mammography, fetal ultrasound, and localization of breast lesions through the use of a Kopan's needle and wire. From the beginning, its planners had envisioned the Center as a self-supporting addition to the network of clinic based health care facilities that Sacred Heart was developing through its affiliate, Gulf Coast Diversified, Inc. It also was anticipated that the Center would be both the source and the beneficiary of referrals to and from Sacred Heart physicians and programs. In short, Sacred Heart was now in direct competition with Dr. Williamson and Pensacola Diagnostic.

4. Dr. Williamson's Second Application to Health First

On May 18, 1987, approximately two months after the Ann Baroco Center opened, Dr. Williamson contacted Dr. Baroco's office and renewed her request for a Health First membership. At that time, it was again explained to her that she did not have the requisite privileges. Nevertheless, Health First sent her an application. Dr. Williamson returned the completed application on June 5, 1987.

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27 Obviously, if Sacred Heart had pursued both options, it would have ended up competing with itself.

Although it was clear that Dr. Williamson did not meet the hospital privileges requirement, several Health First members (most notably Dr. Irvin) spoke to Dr. Shearlock and Dr. Baroco on her behalf. These recommendations notwithstanding, Health First denied Dr. Williamson's application. Although Health First's Board of Directors did not meet to consider the application until June 16, 1987, Dr. Shearlock wrote Dr. Williamson on June 11, and once again told her that, without privileges at either Baptist or Sacred Heart, she was not eligible for membership. Health First's Board of Directors later confirmed Dr. Shearlock's actions by rejecting Dr. Williamson's application.

Between August and September 1987, Dr. Williamson obtained privileges at two of HOP's outlying participating hospitals (Abernathy Hospital in Flomaton, Alabama, and at Greenlawn Hospital in Atmore, Alabama). When Dr. Williamson notified Dr. Shearlock of her newly acquired privileges, she may have assumed that she would then be eligible for Health First membership. However, it is undisputed that Dr. Williamson practices primarily within HOP's "central" service area, i.e. within the greater Pensacola area. Her privileges at these "outlying" hospitals notwithstanding, the bylaws still required her to obtain privileges at either Sacred Heart or Baptist. Since Dr. Williamson still had not obtained these privileges, Dr. Shearlock again rejected her request for membership.

5. <u>Dr. Williamson's 1987 Application for Privileges</u>

(a) Sacred Heart.

In December 1987, several months after she had been denied membership in Health First, Dr. Williamson contacted both Sacred Heart and Baptist and requested that they reconsider her applications for privileges. Because of the time lapse, Sacred Heart requested that Dr. Williamson update her application. Accordingly, on January 22, 1988, Dr. Williamson submitted an application requesting privileges in the Department of Family Practice. Subsequently, On March 8, 1988, she requested that she also be considered for privileges in the Department of Internal Medicine.

On March 11, 1988, Dr. Williamson met with the Credentials Committee and the Chairman of the Department of Internal Medicine. She explained her qualifications for Level I privileges, and, after describing her education and residency in nuclear medicine, she argued that her unique specialty qualified as a "primary care, medically oriented specialty" within the meaning of the Department of Internal Medicine Rules and Regulations provisions describing the eligibility criteria for Level I privileges.

She also argued that her eight years' experience in the primary care of breast cancer patients was at least the functional equivalent of "one year of approved post graduate clinical training in a primary care medically oriented specialty." Finally, Dr. Williamson pointed out that she satisfied the "experienced physician" exception to the requirements for Level II privileges.

Dr. Williamson again stated that she did not wish to practice radiology at Sacred Heart. She explained that many of her patients were frustrated by the fact that when surgery was indicated, she could not admit them to Sacred Heart, but instead

had to turn them over to the care of another physician. She only desired to be able to admit those patients as the attending physician, consult with the appropriate surgeon, introduce her patients to the consultants, explain the procedures, write orders, and supervise the overall care of her patients.

The Credentials Committee concluded that Dr. Williamson had not completed the required one-year residency in a "primary care medically oriented" specialty as required by the bylaws. At its meeting on March 22, 1988, the Executive Committee accepted the Credentials Committee's recommendation that Dr. Williamson's application be denied.

At Dr. Williamson's request, a hearing committee convened on April 27, 1988, to determine whether the rejection was arbitrary, capricious, or unreasonable. Present at the hearing were the committee members, counsel for Sacred Heart, Dr. Williamson and her counsel, representatives from the Departments of Radiology, Family Practice, Internal Medicine, and Obstetrics/Gynecology. As the Department of Radiology's representative, Dr. Hobgood of PRC attended the hearing as an observer. There is no evidence that he otherwise participated in the proceedings.

At the beginning of the hearing, Dr. Williamson voluntarily withdrew her application for membership and privileges in the Department of Family Practice. She then admitted that she had not completed a year of post-graduate clinical training in a "primary care medically oriented specialty" as required by the Rules and Regulations of the Department of Internal Medicine. However, she was prepared to present evidence showing that she was uniquely qualified by experience

in a heretofore unrecognized sub-specialty of internal medicine that she described as comprehensive breast care.

Although the credentialling criteria for the Department of Internal Medicine does not allow for waiver of their requirements by a showing of practical expertise, Dr. Williamson took the position that Section 4.6 of the Sacred Heart Bylaws allowed the Board of Directors of the hospital to waive eligibility requirements where such waiver would serve the best interests of patient care.[28] Thus, she sought to create a record establishing her unique qualifications in the area of breast care.

The Hearing Committee determined that the only issue was whether her rejection had been arbitrary, capricious, or unreasonable, which narrowed down to whether Dr. Williamson satisfied the requirements for Level I privileges as set out in the Rules and Regulations of the Department of Internal Medicine, i.e. whether she had completed one year of post-graduate clinical training. Therefore, the parties concluded that it was unnecessary, if not improper, for Dr. Williamson to present evidence unrelated to this narrow issue. In short, having admitted that she did not meet the literal requirements for Level I privileges, the Hearing Committee determined that its job was at an end.

Subsequently, Dr. Williamson wrote to Jay Hardman, the Hospital Administrator and representative of the Board of

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[28] Section 4.6 of Bylaws, Rules and Regulations of the Medical and Dental Staff of Sacred Heart Hospital provide: "The Board [of Directors] may waive any qualification when in its discretion such waiver will serve the best interest of patient care in the hospital."

Directors, asking that the Board take up the issue of her request for a Section 4.6 exemption. At the same time, Dr. Williamson exercised her right under the Fair Hearing Plan to request appellate review of the Hearing Committee's adverse decision.

At the Appellate Review Committee hearing on August 24, 1988, Dr. Williamson argued that the Hearing Committee erroneously had excluded evidence that her experience in the care and treatment of breast disease patients qualified her for privileges in the Department of Internal Medicine. Dr. Williamson further argued that the bylaws are primarily concerned with maintaining the quality of patient care, and therefore, that they should be interpreted broadly to allow her to show that her qualifications are at least equivalent to those she would have obtained in a oneyear primary care residency.

The Appellate Review Committee nevertheless determined that the Hearing Committee properly had excluded the evidence of Dr. Williamson's equivalent training in her subspecialty. The Committee pointed out that the bylaws do not recognize breast care as a subspecialty within the Department of Internal Medicine, and concluded that neither it, nor the Hearing Committee, were authorized to amend the by-laws to create a new subspecialty or to waive the one-year residency requirement for Level I privileges in the Department of Internal Medicine. According to the Appellate Committee, these issue were solely within the purview of the Board of Directors. The Committee then affirmed the adverse recommendations of both the Hearing Committee and the Executive Committee, and recommended that Dr. Williamson's application for staff membership and privileges in the Department of Internal Medicine be denied.

On September 23, 1988, the Board of Directors reviewed the Appellate Review Committee's decision and recommendation, and adopted a resolution finding that the exclusion of the evidence relating to Dr. Williamson's medical expertise in the area of breast care was proper. The Board then denied her application for staff membership and privileges in the Department of Internal medicine.

In another resolution adopted at the same time, the Board denied Dr. Williamson's request for a Section 4.6 waiver. The Board specifically concluded that there was no compelling reason to waive the eligibility requirements established by the Department of Internal Medicine, and that such a waiver would not serve the best interests of patient care.

(b) Baptist Hospital.

Dr. Williamson's second attempt to obtain privileges at Baptist proved much more fruitful than her attempts at Sacred Heart. In December 1987, Dr. Williamson wrote to Administrator John Robbins requesting that he reconsider her application. At this time, Dr. Williamson also requested information regarding privileges in the Department of Internal Medicine and the Department of Family Practice.

Robbins responded by letter dated January 12, 1988, in which he advised Dr. Williamson that, in order to qualify for privileges in the Department of Radiology, the Baptist Bylaws required the physician to spend at least 30 percent of her diagnostic radiology time in the Baptist Radiological Department. Inasmuch as the exclusive contract with Radiology Associates precluded her from practicing radiology at Baptist, it would be impossible for Dr. Williamson to meet this

requirement. Nevertheless, Robbins again invited Dr. Williamson to detail what she wished to accomplish through membership on the Baptist medical staff.

By letter dated February 25, 1988, Dr. Williamson again explained that she had no desire to use her staff privileges to practice radiology, and that she only wished to admit patients and to provide follow-up care to patients she already had treated at her clinic. Dr. Williamson also discussed her qualifications in the fields of internal medicine and family practice. Finally, Dr. Williamson argued that, under the Baptist Bylaws, her medical staff privileges at University Hospital made her eligible for courtesy staff privileges at Baptist. Accordingly, she requested that Baptist also consider her application as one for courtesy staff privileges.

Baptist continued to process Dr. Williamson' s application, and sometime in May 1988, the radiology department met and determined that she satisfied the minimum standards for privileges in diagnostic radiology at Baptist Hospital. Several telephone conversations then ensued between Dr. Williamson and Michael Fry, M.D., the Chief of Baptist's Department of Internal Medicine, during which the two physicians discussed Dr. Williamson's application for privileges in the Departments of Family Practice and Internal Medicine. The parties were able to work out an accommodation, and, in a letter dated July 27, 1988, Dr. Williamson agreed to withdraw her applications for privileges in those departments if Baptist would grant her application for courtesy privileges in the Department of Radiology.

On August 2, 1988, both the Credentials and Executive Committees recommended approval of Dr. Williamson's

application for appointment to the courtesy medical staff with major privileges under supervision in diagnostic radiology. Subsequently, on August 23, 1988, the Board of Directors of Baptist Hospital approved her appointment.

As Baptist made clear during the processing of her application, Dr. Williamson's ability to practice radiology at Baptist would be circumscribed by its exclusive contract with Radiology Associates. However, plaintiff does not contend that the privileges granted to her were insufficient for her purposes. Further, Dr. Williamson expressed no objection to the bylaws requirement that her privileges be "under supervision" for the first two years of her membership on the Baptist medical staff.

As of the filing of her complaint in this case, Dr. Williamson had not attempted to admit any patients to Baptist. She has visited with patients on three separate occasions. According to Dr. Williamson, she did not review their medical records or make any entries on their charts. However, she did "consult" with these patients and their families on matters concerning the continuing care and treatment of their respective breast diseases.

6. Dr. Williamson's Renewed Attempt to Gain Membership in Health First

On August 10, 1988, Dr. Williamson informed Health First that she had obtained courtesy staff privileges under supervision at Baptist, and requested that her application for membership be processed. In again denying her application, Dr. Shearlock pointed out that the credentialling criteria of the Health First Bylaws require unsupervised privileges at either Baptist or Sacred Heart.

7. Dr. Williamson's Request For A Change In Privileges

Initially, Dr. Williamson expressed no outward signs of dissatisfaction with her privileges at Baptist. However, after she was rejected for membership in Health First, Dr. Williamson wrote to Al Stubblefield (Robbins' replacement as administrator) on January 9, 1989, requesting that her privileges be changed from "under supervision" to "unsupervised".

In her letter, Dr. Williamson emphasizes that her request was prompted by Health First's rejection. Furthermore, Dr. Williamson stated in her deposition that her current privileges were sufficient to meet the needs of her patients, and that she sought reclassification only to gain entrance into Health First.

Stubblefield responded on January 26, 1989, by pointing out that the bylaws, which Dr. Williamson had signed upon accepting her privileges, required that all initial appointments to both the associate and courtesy medical staff be provisional, i.e. "under supervision", for a period of two years before regular membership is granted. In addition, he reminded Dr. Williamson that the bylaws also required her to spend at least 30% of her practice in diagnostic radiology at Baptist before being eligible for regular privileges. Dr. Williamson met neither requirement. Hence, Stubblefield informed the plaintiff that Baptist could not change her privileges.

In a letter dated February 15, 1989, Dr. Williamson questioned Stubblefield's interpretation of the bylaws. Under Dr. Williamson's view, the thirty percent requirement would come into play if she sought promotion from the courtesy staff

to the active staff, but would not bar her promotion from "provisional" (i.e. under supervision) courtesy staff to "regular" courtesy staff (i.e. not under supervision). Dr. Williamson reasoned that, because courtesy staff members are, by definition, physicians who "only occasionally attend patients" at Baptist Hospital, the imposition of the 30% practice requirement would defeat the purpose of having a courtesy staff.

Baptist rejected plaintiff's interpretation of its bylaws, and on March 16, 1989, Stubblefield wrote Dr. Williamson to inform her that both requirements applied to promotions from provisional courtesy to regular courtesy staff privileges. He also reminded Dr. Williamson that the hospital had warned her when she applied for privileges that the exclusive contract would make it impossible for her to meet the 30% practice requirement.

B. THREATS TO "BLACKBALL" DR. WILLIAMSON

Before Dr. Williamson opened her clinic, she contends that she met with Sacred Heart administrator Jay Hardman. Over the course of the meeting, Dr. Williamson says that she explained the organization of the clinic as well as her goal in creating it. At the conclusion of the meeting, Dr. Williamson alleges that Hardman told her that if she opened her clinic, Sacred Heart would close her one way or another, and threatened to "blackball" her. It is plaintiff's contention that Sacred Heart attempted to make good on this threat in three ways. First, Sacred Heart attacked her referral base. Second, it pressured Pensacola Pathologists into firing her husband, Michael Williamson M.D. Finally, it refused to accept her "needle placement" patients. Sacred Heart strongly denies

making any threats against Dr. Williamson and disputes her three alleged theories of implementation.

1. **Attacks on Dr. Williamson's Referral Base**

It is undisputed that referrals from other physicians are vital to the success of Dr. Williamson's practice. According to Dr. Williamson, both Sacred Heart and PRC attacked this referral base in two ways. First, they threatened or otherwise pressured several physicians into reducing the number of patients they referred to her. Second, plaintiff alleges that between 1986 and 1988 Sacred Heart entered into contractual arrangements of one kind or another with several physicians in her referral base. Dr. Williamson alleges that Sacred Heart used its contractual leverage to coerce these physicians into referring patients back to Sacred Heart.

Dr. Murphy: According to plaintiff, the most important physicians in her referral base were B.L. Stalnaker, M.D. and Eugene Murphy, M.D. Drs. Stalnaker and Murphy practiced together as obstetrician/gynecologists. On October 14, 1986, Dr. Murphy gave an interview to the FTC in which he stated that Sacred Heart was not happy that he referred patients to Dr. Williamson. He stated that in several meetings with Sacred Heart administrators, Jay Hardman and defendant Dr. Post tried to convince him to divert referrals to Sacred Heart. According to Murphy, Sacred Heart focused on loyalty to the hospital, rather than on quality of care. Murphy allegedly rebuffed Sacred Heart's entreaties, and stated that because he had an established practice that could be taken

elsewhere, he had enough leverage to "resist that, the gentle arm twisting."[29]

Dr. Stalnaker: Similarly, Williamson states that in 1985, and again in 1986 or 1987, Dr. Murphy's partner, Dr. Stalnaker, told her that Hardman threatened to pull his group's perinatal care contract unless he stopped referring patients to Dr. Williamson. Dr. Stalnaker also allegedly told Williamson that Hardman offered him kickbacks worth $300,000.00, as well as a reduction in his medical malpractice coverage requirement worth another $300,000.00, if he would refer his patients back to Sacred Heart. Finally, Dr. Williamson claims that Dr. Stalnaker told her that Hardman had threatened to call in the loans the hospital had made to various other practices if they continued to refer patients to Williamson.

Of course, all of Dr. Williamson's testimony concerning Dr. Stalnaker's statements to her is inadmissible hearsay. This leaves Dr. Stalnaker's own deposition testimony as the only credible evidence in the record regarding his dealings with Sacred Heart. Dr. Stalnaker flatly denies ever having told Dr. Williamson that Sacred Heart pressured him to divert referrals away from her clinic. He also denies having been offered kickbacks. In fact, Dr. Stalnaker stated that, unless a

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[29] Defendants argue that Dr. Murphy's statements before the FTC are inadmissible hearsay. Actually, Dr. Murphy's statements may include hearsay within hearsay: The FTC testimony involves not only Dr. Murphy's own statements, but also Hardman's statements to Dr. Murphy. In the case of double hearsay, both levels of hearsay must fall within exception to the hearsay rule, or the entire statement is inadmissible. Dr. Murphy is now deceased. Plaintiff seems to be contending that these statements are within one of the exceptions to the hearsay rule, but that cannot be determined at this point.

patient had a specific request, or was an in-patient at a hospital, he referred all his patients to Dr. Williamson.

The evidence on this point is hotly disputed, although it does not appear to be material. Defendants claim that, in 1985, Drs. Stalnaker and Murphy accounted for 354.5 referrals to Dr. Williamson. In 1986, the number of referrals from these two doctors increased to 409.5.[30] Dr. Williamson counters that defendants' figures fail to distinguish between new referrals and repeat visits from old referrals. Taking this factor into account, Dr. Williamson claims that new referrals from Drs. Stalnaker and Murphy dropped from approximately 450 in 1985, to 375 in 1986, and to fewer than 50 per year after 1987.

In viewing these statistics, however, it must be remembered that Dr. Murphy became gravely ill in 1986 and died in December of that year. Subsequently, Dr. Stalnaker sold his practice to Drs. Horan and Turner, and took a position as Director of Sacred Heart's obstetrics/gynecology residency program. As a result, he reduced his private practice to two and one-half days a week in 1986, and to one and one-half days a week beginning in 1989. In 1987 Dr. Stalnaker referred 55 new patients to Dr. Williamson, and in the years 1988-1990 he referred 16, 13, and 17 new patients respectively. In short, the decrease in referrals seems to be fully explained by the circumstances.

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30 These figures were complied by Sacred Heart from Dr. Williamson's patient logs. Instances where two physicians names were listed as referral sources have been counted as half referrals to each doctor.

Drs. Horan and Dr. Turner: In 1985 Drs. Murphy and Stalnaker took in Charles A. Horan, M.D. as an associate. Subsequently, in 1986, they hired David Turner, M.D. After Dr. Murphy's death at the end of 1986, and pending his appointment as Director of Sacred Heart's OB/GYN residency program, Dr. Stalnaker agreed to sell his practice to Drs. Horan and Turner. Because they were young and had little or no collateral, Drs. Horan and Turner did not believe that they could get a bank loan for the purchase.

Consequently, Sacred Heart agreed to lend them the money. The loan agreement called for interest only payments during the first year, interest and principal payments in the second and third years, and a balloon payment in the third year with an option to renew. In addition, Sacred Heart did not require that the loan be fully collateralized. Both physicians stated that these terms were very advantageous.

According to the agreement, Sacred Heart made the loan as an inducement to Drs. Horan and Turner to maintain their practice in the Sacred Heart service area and to provide professional services to their patients at Sacred Heart. In addition, paragraph 3(b) of the agreement, under "covenants", also provides:

> In consideration for the aforesaid inducements from Hospital to Corporation, Corporation agrees that its physician shareholders and employees shall utilize the in-patient and out-patient facilities operated by Hospital and its affiliated corporations for their patients, to the extent feasible, and unless patient choice dictates otherwise.

Drs. Horan and Turner stated that maintaining the viability of their practice was important to Sacred Heart since it stood to lose approximately 30% of its OB-GYN service if their practice collapsed.

According to Dr. Williamson, Drs. Horan and Turner told her that Sacred Heart threatened not to renew their note unless they referred their radiology patients to Sacred Heart. Once again, Dr. Williamson's statements concerning Drs. Horan and Turner are hearsay and do not appear to fall within any exception to the hearsay rule. Therefore, the only credible evidence in the record concerning the relationship between Sacred Heart and Drs. Horan and Turner are the statements of the doctors themselves. Both physicians deny that the referral covenant created a quid pro quo requiring them to refer patients to the hospital's radiology department, or that they were under any pressure to make such referrals. Dr. Horan also denies having made any statements to the contrary to Dr. Williamson.

According to Dr. Horan, he and Dr. Turner were free to refer their patients as they saw fit. In this regard, defendants have submitted statistics which show that during the years 1986, 1987, 1988, and 1989, these two doctors accounted for 81, 80, 106.5, and 187.5 breast referrals to Dr. Williamson. Plaintiff does not agree with these statistics. Furthermore, Dr. Turner states that they chose not to renew the note in 1989 when the balloon payment came due, and had no further agreement after 1989.

Dr. Antonelli: In August 1987, Sacred Heart loaned Emilio Antonelli, M.D. and Stricker Mays, M.D. $300,479.00 to buy the OB/GYN practice of Eddie M. Frazier, M.D. This

agreement is very similar to that of Drs. Horan and Turner, except that the "utilization" clause reads:

> In consideration of the aforesaid inducements from Hospital to Corporation, Antonelli and Mays agree that they shall utilize the inpatient and outpatient facilities operated by Hospital and its affiliated corporations for their patients, to the extent feasible, and in accordance with acceptable medical practice, and unless patient choice dictates otherwise.

According to Dr. Antonelli, Sacred Heart wanted to insert a more restrictive clause, but backed down after he refused.

In his deposition, Dr. Antonelli praised Dr. Williamson, and stated that, unless a patient requested otherwise, he always referred his patients to Dr. Williamson. There is absolutely no evidence that his relationship with Sacred Heart affected his referral patterns.

Drs. Fowler and Willis: Sacred Heart also loaned Louis B. Fowler, M.D. and Wayne Willis, M.D., partners in a family care practice, $50,000.00 to build a small pharmacy building on their office property. Drs. Fowler and Willis then leased the building back to Sacred Heart, which operated it as a pharmacy. During initial negotiations, Sacred Heart evidently asked them to refer their patients to the hospital. According to Drs. Fowler and Willis, they told Sacred Heart that they wouldn't have anything to do with such an arrangement, after which Sacred Heart "immediately" backed down. Subsequently, neither physician has received any pressure from

Sacred Heart to refer patients to the hospital. Nor is there any evidence that their referral pattern vis-a-vis Dr. Williamson changed after they entered into the agreement with Sacred Heart.

In fact, Drs. Fowler and Willis subsequently entered into an arrangement whereby Dr. Williamson agreed to overread their x-rays on an "as needed" basis. Drs. Fowler and Willis previously had approached PRC at Sacred Heart with the same proposal. When Dr. Post of PRC insisted not only that his group read all films generated by the Fowler/Willis clinic, but also that PRC have supervisory control over their clinic's radiology department and employees, Drs. Fowler and Willis discontinued negotiations with PRC and reached the agreement with Dr. Williamson.

Shortly after this agreement was consummated, Sacred Heart's lease on the pharmacy expired, and they chose not to renew it. Plaintiff attempts to link her agreement with Drs. Fowler and Willis with Sacred Heart's abandonment of the pharmacy. However, Sacred Heart's representative in charge of the pharmacy, Richard Zeiler, as well as Drs. Fowler and Willis, denied any such linkage and stated in their depositions that the pharmacy was closed because it was not financially successful. Though it turned a small profit, the parties anticipated that sales would continue to fall off when a national drug store chain completed construction of a nearby store.

Dr. McMahon: Dr. Williamson further alleges that Dr. McMahon - - - who is the Medical Director of the Sacred Heart Surgery Center, and the Chairman of the Department of Surgery - - - told her that, because he had to support the hospital, he could not work with her. As with Dr. Stalnaker,

Dr. McMahon denies ever having made such a comment to plaintiff.

Drs. Belk and Irvin: Dr. Williamson also claims that William W. Belk, M.D. and E. Coy Irvin, Jr., M.D. - - - partners in a family care practice - - - told her that Sacred Heart told them not to talk to her. According to Dr. Williamson, Drs. Belk and Irvin succumbed to the pressure from Sacred Heart, and stopped sending patients to her in 1987. In support of her argument, she points out that in 1986 and 1987 Drs. Belk and Irvin accounted for over 200 new referrals per year. However, after August 1987, when they entered into what Dr. Belk described as a "joint venture" with Sacred Heart to open a satellite office in Pace, Florida, their referrals decreased to 108 for 1988, and to 70 and 25 in 1989 and 1990, respectively. The precise nature of this "joint venture" is unclear, but it is undisputed that Sacred Heart rented the office and subleased it to Drs. Belk and Irvin. It is also undisputed that the contract contained no provisions relating to referrals.

Again, Dr. Williamson's statements are hearsay and are not admissible to prove the truth of what Drs. Belk and Irvin told her. And, once again, Drs. Belk and Irvin, like Drs. Horan and Turner, deny being under any pressure to disassociate themselves from Dr. Williamson. Instead, they mention a number of factors that lead to a decrease in referrals to Dr. Williamson.

Prior to 1987, Drs. Belk and Irvin were located next door to Dr. Williamson, making her services very convenient. Sometime in 1987; they acquired x-ray equipment for their Pensacola office and started to do much of their own x-ray work. In addition, they moved their Pensacola office to a new

Gulf Coast Medical Arts Center several miles away from Dr. Williamson's clinic.[31] This move placed Dr. Williamson's facilities and Sacred Heart's facilities equally distant from their offices. At the same time, Sacred Heart opened its own women's clinic, the Ann Baroco Center. Dr. Belk stated that as the Ann Baroco Center became more established, patients began asking to go there. Finding no difference in the quality of care between Dr. Williamson and the Ann Baroco Center, Drs. Belk and Irvin respected these requests.[32] Despite the fact that, after 1987, they performed their own simple x-ray procedures, defendants claim that referrals to Dr. Williamson from Drs. Belk and Irvin actually increased. They claim that plaintiff's records show that in 1987, Drs. Belk and Irvin accounted for 136.5 referrals to her clinic.[33] This number decreased in 1988 to 132 referrals, but increased again in 1989 to 157 referrals.

Dr. Howard: On December 13, 1984, Joseph D. Howard, M.D. entered into an agreement with Gulf Coast Diversified ("Gulf Coast"), an affiliate of Sacred Heart and co-owner of HOP, to operate a family care clinic. According to the agreement, Gulf Coast would provide the administrative support and Dr. Howard would provide the physician services. The agreement states that Dr. Howard is an independent

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31 Gulf Coast Medical Arts Center is a group of several practices that pooled their resources to build an office complex. Sacred Heart is not associated with Gulf Coast Medical Arts Center.

32 Drs Belk and Irvin do not contend that there was any problem with Dr. Williamson's quality of care.

33 As discussed above, defendants' numbers do not differentiate between new referrals and repeat visits by old referrals.

contractor. The agreement also states that "[Gulf Coast] shall be notified of any referral of patients . . . for medical services to any entity other than Sacred Heart Hospital of Pensacola." Finally, the agreement states that "[Dr. Howard] agrees to utilize specialty physicians who are members of the medical staff of Sacred Heart Hospital of Pensacola wherever practical to ensure continuity of patient care."

There is no indication that Dr. Williamson ever had a referral relationship with Dr. Howard. Instead, she alleges that Dr. Howard's referrals to Thomas Brown, M.D., another independent radiologist for whom Dr. Williamson worked when she first came to Pensacola, virtually ceased after Dr. Howard entered into the agreement with Sacred Heart.

In her affidavit, Mary Ellen Neal, Dr. Howard's head nurse at the time, stated that, when Sacred Heart established its relationship with Dr. Howard, she became an employee of Sacred Heart. She was supervised by a head nurse who came to the clinic from Sacred Heart Hospital, and who, in turn, reported to the Sacred Heart administration.

Ms. Neal states that prior to Dr. Howard's relationship with Sacred Heart, the majority of his referrals for out-patient radiological services went to Dr. Brown. Immediately after the relationship began, the supervising nurse told Ms. Neal that the clinic staff was to send all out-patient radiological referrals to Sacred Heart. She was told not to ask the patient where they wanted to go, but instead, to simply schedule the patient for Sacred Heart. Only if the patient objected were the staff to consider referring the patient to another facility. As a result, referrals to Dr. Brown virtually ceased. Of course, as previously noted, Dr. Brown in not a party to this case, and

there is no evidence of any relationship between plaintiff and Dr. Howard that is relevant to this issue.

Dr. Mixon: On April 10, 1989, shortly after Dr. Williamson filed her complaint in this case, Fred S. Mixon, M.D. entered into an agreement to operate a family care clinic similar to that between Gulf Coast and Dr. Howard. As with Dr. Howard, Gulf Coast supplied administrative support, while Dr. Mixon provided physician services. Also like Dr. Howard, Dr. Mixon is an independent contractor. In addition, Dr. Mixon's agreement contains the same requirement that he utilize specialty physicians from Sacred Heart "wherever practical to ensure continuity of patient care." However, Dr. Mixon's agreement contains an additional restriction specifically requiring him to utilize radiology services provided by Sacred Heart unless Sacred Heart instructs him to use an outside radiologist. According to Dr. Brown, referrals from Dr. Mixon ceased after he entered into this agreement. As with Dr. Howard, the record reflects no relationship between Dr. Mixon and the plaintiff that is relevant to this issue.

Dr. Cross: Dr. Williamson has alleged that David Alan Cross, M.D., a local surgeon, intimated to her that he and others with whom he was familiar were under pressure from Sacred Heart to route their radiology referrals back to Sacred Heart. As with the other physicians alleged to have been under such pressure, Dr. Cross stated under oath that he was under no pressure, had not been threatened by Sacred Heart, knew of no other physicians subject to pressure or threats, knew of no direct attempts to interrupt Dr. Williamson's referral patterns and that he never communicated any information to the contrary to Dr. Williamson. Dr. Williamson's testimony again appears to be inadmissible hearsay.

Dr. Westafer: Remarkably, Dr. Williamson next points to the contract between Anita S. Westafer, M.D. and Baptist Hospital. As with the contracts between Drs. Mixon and Howard and Sacred Heart, Baptist agreed to help equip and staff Dr. Westafer's office, in return for which Dr. Westafer agreed to provide the specified physician services. Dr. Williamson argues that after Dr. Westafer signed this contract in April of 1988, her referrals to Dr. Williamson decreased from approximately 70 new referrals on 1987 to 30 and 40 referrals in 1988 and 1989.

What plaintiff fails to mention is that Dr. Westafer's new referrals to Dr. Williamson had been dropping off steadily since 1985. In that year Dr. Westafer referred approximately 130 new patients. New referrals dropped to just under 100 in 1986, and to approximately 70 in 1987. In 1988, the year Dr. Westafer signed the contract with Baptist, her new referrals dropped to a low of approximately 30, but began to rise again to 40 in 1989, and to over 50 in 1990.

Moreover, Dr. Westafer's contract specifically states that she is not required to refer patients to Baptist. Quite to the contrary, the agreement provides:

> Admittance of Patients
>
> [Dr. Westafer] hereby acknowledges that the choice of services and the choice of service of suppliers that [Dr. Westafer] makes on behalf of its patients must be, and will be, made only with regard to the best interest of the patients themselves. Physician hereby specifically acknowledges, that the compensation that

> [Dr. Westafer] is to receive hereunder in no way requires, and is in no way contingent upon, the admission, recommendation, referral or any other form of arrangement by [Dr. Westafer] for utilization by patients or others of any item or service offered by the Hospital.

Drs. French and Montgomery: In October 1988, Baptist advanced Barbara French, M.D. and Paula Montgomery, M.D. working capital in the amount of $40,000.00 to open up their family care practice in Escambia County. Their loan agreement contained a clause identical to that quoted above from Dr. Westafer's contract. Plaintiff does not argue that Drs. French and Montgomery ever referred significant numbers of patients to her. Instead, she advances the novel theory that, but for their contractual relationship with Baptist, their referrals to her would have grown significantly.

In support of her contention, plaintiff compares the referral patter of Drs. French and Montgomery to that of Dr. Epps. Not a party to a contract with any hospital, Dr. Epps increased his new referrals to Dr. Williamson from 34 in 1987 to 325 in 1990.

Dr. Williamson also claims that members of the Sacred Heart Staff made disparaging remarks to others concerning the quality of her medical care and that of her clinic. Again, the only evidence supporting this allegation is the testimony of Dr. Williamson, which is inadmissible hearsay. And again, every physician that plaintiffs deposed denied ever having heard or made any of the disparaging remarks as claimed by the plaintiff, so the only material evidence of record fails to support plaintiff's claims.

2. Alleged Threats to Michael Williamson

When the Williamsons moved to Pensacola, Dr. Williamson's husband, Michael Williamson, M.D., a pathologist, became a professional employee of Pensacola Pathologists. In 1985, after two years employment, Dr. Michael Williamson became a shareholder and director of the professional association. Throughout his employment with Pensacola Pathologists, the corporation held an exclusive contract with Sacred Heart for the provision of pathology services. Eighty percent of the corporation's income came from this contract.

Shortly after Dr. Angel Williamson began advertising her clinic in 1984, Jerrard H. Hilbert, M.D., Pensacola Pathologists' founder, called a meeting of the group. According to Dr. Michael Williamson, Dr. Hilbert told him in front of the other physicians that Sacred Heart was upset with the Pensacola Diagnostic's advertising. He also allegedly stated that the advertising could mean trouble for the group and that trouble for the group would mean trouble for Michael Williamson. Dr. Hilbert then allegedly requested Dr. Michael Williamson to ask his wife to tone down her advertising.

David P. Nicholson, M.D., another shareholder in Pensacola Pathologists, stated that, around the time Dr. Angel Williamson began advertising her clinic, he had conversations with Dr. Hilbert in which Dr. Hilbert expressed concern over the fact that plaintiff's advertising might have a negative impact on Pensacola Pathologists' relationship with Sacred Heart. However, Dr. Nicholson stated that Dr. Michael Williamson was not present during these conversations, and that he had no

knowledge of anyone from the group discussing the matter with Sacred Heart.

Dr. Michael Williamson further stated that, around the same time he commented on Pensacola Diagnostic's advertising, Dr. Hilbert told him that Sister Mary Carroll, a Sacred Heart administrator, had questioned him (Dr. Hilbert) about the quality of his (Dr. Michael Williamson's) work. Dr. Michael Williamson stated that such questioning by the Sisters was very unusual, and that he took it to be a threatening gesture.

Dr. Hilbert denies ever having made any of these statements. In addition, as discussed more fully below, these statements attributed to Dr. Hilbert are hearsay to the extent they are offered to show that Sacred Heart, in fact, threatened or pressured Pensacola Pathologists.

Dr. Angel Williamson also has testified to a number of conversations she allegedly had with Pensacola Pathologists shareholders concerning the effect of her practice on her husband's job. She states that Dr. Hilbert and Dr. Nicholson, along with Everett S. Harvard, M.D. and Fenner McConnell, M.D. (the two remaining Pensacola Pathologists shareholders), told her that Sacred Heart was very angry about her advertising, that this meant trouble for Pensacola Pathologists, which meant trouble for Dr. Michael Williamson.

Dr. Angel Williamson also states that, during the time when she was negotiating with PRC and Sacred Heart for the purchase of her practice, Dr. McConnell told the Williamsons at dinner one night that Jay Hardman had tried very hard to make the corporation fire Dr. Michael Williamson. He allegedly went on to state that things would be better for

everyone if she reached an agreement with Sacred Heart. Once again, all of the Williamsons' statements concerning what Dr. McConnell and other members of Pensacola Pathologists said are inadmissible hearsay.

According to Dr. McConnell, the Williamsons invited him and his wife to dinner at a local restaurant, where Dr. Angel Williamson told him that she was negotiating with Sacred Heart and PRC to join the radiology group. Dr. McConnell states that he responded that he was happy because it would make his job easier. He admitted that the controversy between Sacred Heart and Dr. Angel Williamson made him uncomfortable in the negotiation of his own contract with Sacred Heart. He denied that any threats, of any type, were made by Sacred Heart.

When Dr. McMahon and Jay Hardman visited Dr. Angel Williamson in December 1985 to tell her that Sacred Heart no longer would accept her needle placement patients, Hardman allegedly asked her how she would feel if her husband's group lost its contract. Dr. Angel Williamson claims that she understood this to mean that if she fought the decision to ban her patients, Sacred Heart would have her husband fired.

Pensacola Pathologists' contract with Sacred Heart expired on December 31, 1988. Although negotiations to renew the contract began as early as September 1988, the parties did not reach an agreement on a new contract until June 1989. Until that time, Pensacola Pathologists continued to work without a contract. According to Dr. Angel Williamson, Drs. Hilbert and McConnell told her husband that this delay was occasioned by Sacred Heart's displeasure over her competition with them. These statements are also inadmissible hearsay.

Dr. McConnell expressed his concern over this delay in a conversation with Dr. David Cross. According to Dr. McConnell, he told Dr. Cross that he felt that, in general, Sacred Heart was putting undue pressure on hospital based physicians to accept increasingly more restrictive contract terms. In particular, Dr. McConnell commented on the fact that Sacred Heart was pressuring his own group into accepting a 90-day termination clause that he felt was unfair to the physicians. It also appears that Sacred Heart would not agree to an increase in the reimbursement rates for certain services. Although Dr. McConnell denies that any of this pressure was connected to Sacred Heart's ongoing controversy with Dr. Angel Williamson, he did indicate that the group had decided to terminate its relationship with Dr. Michael Williamson.

Dr. Cross tells a different story. According to Dr. Cross, sometime in May 1989, he had gone to the pathology department to speak with Dr. McConnell. Their conversation turned to the subject of Pensacola Pathologists' negotiations to renew their contract. At this point, Dr. McConnell allegedly told Dr. Cross that his group had acquiesced to pressure from Sacred Heart to get rid of Dr. Michael Williamson, and that, as a result, they would be able to renew their contract.

Several weeks later, on June 14, 1989, Pensacola Pathologists and Sacred Heart completed negotiations on the pathology contract. On the same day, Drs. Hilbert and Harvard informed Dr. Michael Williamson that Pensacola Pathologists would terminate his employment as of November 30, 1989. On June 15, 1989, Sacred Heart signed the pathology contract. On June 22, 1989, the Board of Directors of Pensacola Pathologists

formally voted to terminate Dr. Michael Williamson, as their professional agreement allowed. As a result, he lost his privileges to practice at Sacred Heart, and was forced to sell his shares in the corporation.

Drs. Hilbert, Harvard and McConnell have denied that there was any connection between the renewal of the pathology contract and the termination of Dr. Michael Williamson. In addition, they point out that, at the same time Sacred Heart and Pensacola Pathologists completed their negotiations, Pensacola Pathologists also decided not to renew its contract with Roche Laboratories. During his time with the group, Dr. Michael Williamson had spent at least 50 percent of his time at Roche on behalf of the group. Thus, Pensacola Pathologists maintains that it simply had no further need for Dr. Michael Williamson's services.

Drs. Hilbert, Harvard, and McConnell also have stated that Sacred Heart never expressed any concern or complaints over Dr. Angel Williamson's advertising, and that the hospital never exerted any pressure on the group to fire Dr. Michael Williamson. In addition, each has stated that he never told Dr. Angel Williamson that the group was in danger of losing its contract because of its association with her husband. To the contrary, when the pathologists approached Sacred Heart with their concern that Dr. Michael Williamson's association with the group might influence the upcoming contract negotiations, Jay Hardman is alleged to have told Dr. McConnell that Dr. Michael Williamson would have to be judged on his own merits.

3. The Needle Placement Controversy

Occasionally, Dr. Williamson's examination will reveal a lesion in the patient's breast which must be removed for analysis. Often these lesions are nonpalpable, and too small to be found easily by the surgeon. The accepted procedure in these circumstances is to insert a Kopan's needle containing a very thin hook-wire into the breast at the point of the suspected lesion. After properly positioning the needle so that it isolates the lesion, the radiologist removes the needle, leaving the hook-wire attached to, or very near, the lesion. The surgeon need only follow the wire to find the suspected lesion.

Once the suspected lesion is removed, the specimen is then transported to the radiologist and a pathologist for examination and testing. The pathologist dissects the specimen, after which the radiologist performs an x-ray on the dissection. The radiologist then compares this film to the original x-ray to ensure that the proper tissue has been removed. The specimen is then sent to a pathologist who determines whether the lesion is cancerous.

When a Sacred Heart radiologist initiates the needle placement procedure, each subsequent step is performed on the Hospital premises. The radiologist performs the mammogram, places the needle, and then escorts the patient to the Sacred Heart surgi-center. A Sacred Heart surgeon removes the specimen, which is then transported back to the radiology department. There, a pathologist dissects the specimen and examines it along with the radiologist. The radiologist then re-mammograms the specimen. The pathologist then takes the specimen back to the pathology department for further testing. In the meantime, the patient remains in the surgery area in case further specimens are needed.

In the fall of 1985, shortly after Sacred Heart denied her first request for privileges, Dr. Williamson met with Drs. Hilbert, McConnell, Havard, and Nicholson of the Sacred Heart Pathology Department. They discussed the feasibility of Dr. Williamson performing the needle placement procedure at her clinic and then sending the patient to Sacred Heart for specimen removal and pathological examination. Dr. Williamson would identify the lesion, position the needle and localize the wire. A technician would then walk with the patient across the Sacred Heart parking lot to the Sacred Heart surgi-center, where a surgeon would remove the specimen.[34]

Once removed, the specimen would be returned to Dr. Williamson's clinic for dissection and another x-ray. After determining that the proper tissue had been removed, Dr. Williamson would send the specimen to the Sacred Heart pathology department for further testing. While Dr. Williamson performed these procedures, the patient would remain on the operating table at the surgi-center.

The pathologists agreed that an arrangement could probably be worked out, and Dr. Williamson was permitted to follow this procedure with several patients. No quality of care problems ever arose on these occasions. Nevertheless, shortly after Dr. Williamson implemented this protocol, technicians at the surgi-center contacted the pathologists and questioned whether it was appropriate to send specimens off the Sacred Heart grounds.

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34 Dr. Williamson's clinic is adjacent to the Sacred Heart Hospital grounds, and is no farther from the surgi-center, which is free-standing, than the Sacred Heart radiology department.

At the same time, William R. Bell, M.D., a member of the pathology group not present at the meeting with Dr. Williamson, expressed a number of concerns related to quality assurance and legal liability. First, Dr. Williamson's procedure did not allow for joint review of the biopsy specimen by the radiologist and the pathologist. Second, the procedure involved dissection of the specimen by Dr. Williamson, who, as a radiologist, is not specifically trained in such procedures. Third, the transportation of the specimen to Dr. Williamson's clinic would involve loss of control over the integrity of the specimen. Fourth, delays in processing the specimen might lead to deterioration. Finally, because she did not have staff privileges, Dr. Williamson was outside the Sacred Heart quality assurance mechanism.

Dr. Bell discussed his concerns with Dr. Hilbert, Dr. McMahon (the Medical Director of the Sacred Heart Surgical Center and the Chairman of the Department of Surgery), and Sacred Heart administrator Edward Lohmiller. As a result, the administration called a meeting of the Medical Advisory Board. The Board met on December 4, 1985. After much discussion, it concluded that the breaks in the quality control chain not only threatened the integrity of the needle placement procedure, but also unnecessarily exposed the hospital to civil liability. Although no one could demonstrate that Dr. Williamson's protocol resulted in a decrease or decline in the quality of care, and despite the fact that several of the physicians present apparently felt that there was no serious problem, the Advisory Board recommended both that the hospital not allow specimens removed at Sacred Heart to be transported outside the Sacred Heart complex, and that Sacred Heart not accept needle placement patients whose lesions had been localized in a physician's office outside the hospital.

Several days later, Jay Hardman, Sacred Heart's administrator, and Dr. McMahon visited Dr. Williamson at her office and told her of the Advisory Board's decision. However, it was not until April 1, 1987, that the Surgical Center issued a written policy statement directing that all specimens removed from a patient's body be submitted directly to the pathology department. This statement did not address the needle localization, and it was not until October 17, 1989, that Dr. Whitcomb wrote Dr. Williamson and made it clear that Sacred Heart would no longer accept patients with needle localizations for breast biopsy unless they were under the care of a Sacred Heart staff radiologist.

Despite its stated concern over the removal of specimens from the Sacred Heart campus, it is undisputed that the pathology department received thousands of samples, including breast biopsies, from places other than the Sacred Heart Surgical Center. In addition, it is undisputed that the pathology department routinely sends specimens to outside laboratories.[35] Other doctors utilize couriers to send samples to Sacred Heart's pathologists. Dr. Williamson argues that Sacred Heart's professed quality control concerns were illusory, and that her needle placement procedure posed no greater quality assurance concerns than Sacred Heart's procedure. Specifically, she contends that board certified radiologists are qualified to dissect breast biopsy specimens, and that the removal of the specimen

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[35] As a matter of standard procedure, specimens entering or leaving the Pathology Department are transported by courier. However, on occasion, a patient or a doctor may bring a sample directly to the department for analysis. Sacred Heart employed its own couriers to transport specimens between different locations within the Sacred Heart complex.

to her clinic poses no greater risk than the use of any outside laboratory.

PLAINTIFFS' CLAIMS

Dr. Williamson and her clinic filed the complaint in this case on March 29, 1989. Count I of the complaint alleges a conspiracy among Sacred Heart, PRC, and Dr. Post to restrain trade in violation of Section 1 of the Sherman Act [15 U.S.C. § 1] by making it impossible for independent radiologists to compete against them in the provision of radiology services. Count II alleges a similar conspiracy between Baptist and Radiology Associates. Count III alleges a conspiracy among all the defendants to restrain trade in violation of Section 1 of the Sherman Act by excluding Dr. Angel Williamson from Health First, and thus from HOP and its patient base. Count IV alleges a pendant state law claim against Sacred Heart, PRC, and Dr. Post for tortious interference with present and prospective business relationships.

Defendants counter that there is no evidence of an antitrust conspiracy and that plaintiff Williamson has failed to show an antitrust injury. In addition, Sacred Heart, Baptist and Health First argue that their actions in denying Dr. Williamson's requests for privileges and staff membership are immune from antitrust liability under the Health Care Quality Improvement Act, Title 42, United States Code, Sections 11101, *et seq.* Finally, Sacred Heart, PRC and Dr. Post argue that there is no evidence that they improperly interfered with plaintiff's business relationships.

II. ANALYSIS

A. Defendants' Joint Motion to Strike Expert Witnesses' Affidavits

Before taking up the substance of defendants' several motions for summary judgment, I first must address their joint motion to strike certain expert witnesses' affidavits submitted by plaintiff Williamson in support of her opposition to defendants' motions. (doc. 317). For the reasons set out below, that motion is GRANTED.

On May 26, 1989, I entered my standard scheduling order. To facilitate expert witness discovery pursuant, the order provided:

> Expert Witnesses. The identification of expert witnesses and their opinions is commonly the source of most pretrial delay. In order to expedite the discovery process, and in addition to the requirements of Rule 26(B)(4)(A), each party shall submit to the opposing party at the earliest opportunity a list of all expert witnesses anticipated to testify at trial. The list shall also included the address and area of expertise of each expert witness. A copy of each expert's written opinion with supporting facts and grounds, or a written summary thereof, shall be attached to the list. Although no time deadline is set herein for the submission of this information, the parties are directed to do so sufficiently in advance of the discovery deadline set in paragraph (a) of this order so depositions may be scheduled and taken before the discovery period ends. Expert witnesses not

> timely identified as required herein, or whose expert opinions have been significantly modified or changed after discovery has ended, will normally not be permitted to testify at trial.[36] (emphasis added)

Before the discovery period closed on April 30, 1990, the defendants propounded interrogatories seeking the name of each person Dr. Williamson expected to call as an expert witness at trial in this matter. In connection with each expert, defendants also requested that Dr. Williamson identify (1) the subject matter on which each expert would testify, (2) the substance of the opinions to which each expert would testify, and (3) a summary of the facts upon which the opinions were based.

In her responses, which are dated January 26, 1990, April 13, 1990 and April 25, 1990, Dr. Williamson interposed a general objection to the interrogatories as a whole, stating that due to delays in discovery occasioned by defendants' failure to

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36 Federal Rule of Civil Procedure 26(b)(4) provides:

> (4) Trial Preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)((l) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:
>
> (A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

produce relevant documents, she had been unable to fully develop responses. Specifically with regard to the expert witness interrogatories, Dr. Williamson answered that she "has not yet determined which expert may be called as a witness at trial of this matter. When this determination is made, Williamson will respond to this interrogatory."

As early as March 7, 1990, plaintiff's attorney had written to defendants' attorneys explaining that plaintiff's experts would not be able to form their opinions until all discovery was complete. Therefore, he suggested that the parties agree to engage in expert discovery after the completion of fact discovery. Defendants refused to agree to extend discovery beyond the April 30, 1990, cut-off date.

At the end of the discovery period, defendant Sacred Heart identified one expert. However, the expert's report was not produced until February 27, 1991, when Sacred Heart filed it as an exhibit to its motion for summary judgment. No other defendant has identified an expert. Plaintiff did not reveal any experts until April 1, 1991, almost a year after the discovery period had ended, when she incorporated their affidavits into her opposition to defendants' several motions for summary judgment.

Alleging a failure to comply with Federal Rules of Civil Procedure 26(b)(4) and 26(e), and this court's Scheduling Order of May 26, 1989, setting the April 30, 1990, discovery deadline, defendants moved to strike these affidavits, as well as the affidavits of several fact witnesses whom defendants claim plaintiff has not previously identified. In response, plaintiff claims that delays in the completion of discovery prevented her

from identifying her experts until just before filing her response.

The plaintiff failed to comply with the Scheduling Order's clear requirements concerning expert witnesses. Therefore, the testimony of such witnesses must be disallowed, as the order expressly warns.

B. Summary Judgment Standard

A motion for summary judgment should be granted when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is, entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c) *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265, 273 (1986); *Everett v. Napper*, 833 F.2d 1507, 1510 (11th Cir. 1987). An issue of fact is "material" if it might affect the outcome of the case under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202, 211 (1986). It is "genuine" if the record taken as a whole could lead a rational trier of fact to find for the non-moving party. *Id. See also Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538, 552 (1986).

"The moving party is entitled to judgment as a matter of law if the nonmoving party cannot sufficiently show an essential element of the case to which the nonmoving party has the burden of proof." *Cornelius v. Town of Highland Lake*, 880 F.2d 348, 351 (11th Cir. 1989), *cert, denied*, 494 U.S. 1066, 110 S. Ct. 1784, 108 L. Ed. 2d 785 (1990). However,

summary judgment is improper "[i]f a reasonable fact finder could draw more than one inference from the facts, and that inference creates a genuine issue of material fact." *Id.*

On summary judgment motion, the record and all inferences that can be drawn from it, must be viewed in the light most favorable to the non-moving party. *United States v. Diebold, Inc*, 369 U.S. 654, 655, 82 S. Ct. 993, 994, 8 L. Ed. 2d 176, 177 (1962). Furthermore, the court must consider the entire record in the case, not just those pieces of evidence which have been singled out for attention by the parties. *See Clinkscales v. Chevron USA, Inc.*, 831 F.2d 1565, 1570 (11th Cir. 1987).

C. Health Care Quality Improvement Act

In their several motions for summary judgment, defendants argue that plaintiffs claims are barred by the Health Care Quality Improvement Act, Title 42, United States Code, Section 11101, *et seq.* ("HCQIA"). This statute creates antitrust immunity for a "professional review body" in connection with a "professional review action." 42 U.S.C. § 11111(a). Defendants correctly point out that Sacred Heart, Baptist, and Health First qualify as "professional review bodies," and that their decisions regarding privileges and membership qualify on their face as "professional review actions."[37] However, they also concede, as they must, that for

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[37] Not all of the actions alleged to have been taken by the defendants necessarily qualify as "professional review actions." For example, the alleged actions taken to divert referrals from plaintiff to defendants do not so qualify. Thus, even if the HCQIA acted to bar liability for the denial of privileges, antitrust liability in theory still could exist with respect to such nonqualifying activities.

immunity to attach under the HCQIA, the review action must have been taken "in the reasonable belief that the action was in the furtherance of quality care," and "in the reasonable belief that the action was warranted by the facts known after [a] reasonable effort to obtain the facts and after [providing] notice and hearing procedures." *Id.* at § 11112(a). The statute creates a rebuttable presumption that these requirements have been met. *Id.*

In this case, the major thrust of plaintiff's claims is that the defendants did not act in a reasonable belief that their actions furthered quality health care. As the evidence amply demonstrates, Dr. Williamson is a qualified professional whose services are well regarded by many of her peers. I agree with defendants that there is a substantial amount of evidence supporting the application of the HCQIA to the actions in question, but it cannot be resolved on summary judgment. Sufficient evidence exists to create a genuine issue of fact on the question of whether defendants acted reasonably in the furtherance of quality of care.

In addition, there is a question as to whether Dr. Williamson vas afforded notice and a hearing within the meaning of the Act. I realize that there is no evidence suggesting that Dr. Williamson requested such a hearing, but the record is silent as to whether one was readily available. Furthermore, with regard to the hearings incident to Sacred Heart's denial of plaintiff's application, the evidence indicates that plaintiff was not given an opportunity to present evidence on quality of care issues or her expertise.

Therefore, defendants' several motions for summary judgment must be denied to the extent that they are based on the HCQIA. Further discussion of this issue is unnecessary in light of my conclusion, set out below, that plaintiff has failed to establish a genuine issue of material fact as to the existence of an antitrust conspiracy.

D. Conspiracy In Restraint of Trade

Section 1 of the Sherman Act, Title 15, United States Code, Section 1, provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations is declared to be illegal.

The threshold requirement of a conspiracy claim under this statute is existence of an agreement between two or more persons demonstrating a "unity of purpose or a common design and understanding, or a nesting of minds in an unlawful arrangement." *Seagood Trading Corp. v. Jerrico, Inc.*, 924 F.2d 1555, 1573 (11th Cir. 1991) (*quoting American Tobacco Co. v. United States*, 328 U.S. 781, 810 66 S. Ct. 1125, 1139, 90 L. Ed. 1575 (1946). *See also Bolt v. Halifax Hospital Medical Center*, 891 F.2d 810, 818-19 (11th Cir. 1990).

The courts recognize that it is the rare case in which the plaintiff can establish the existence of a conspiracy by showing an explicit agreement. Therefore, most conspiracies are inferred from the behavior of the alleged conspirators. *Seagood Trading*, 924 F.2d at 1573. However, the range of inferences

that may be drawn from circumstantial evidence to prove an unlawful conspiracy is limited. *Id.* at 1574 (citations omitted).

To make out the conspiracy, and thus avoid summary judgment, the circumstantial evidence upon which the plaintiff relies must establish a non-legitimate motive for entering into such a conspiracy. *Seagood Trading, supra*, 924 F.2d at 1574; *Bolt, supra*, 891 F.2d at 819. In other words, the plaintiff must show that collective behavior is economically reasonable in that it accomplishes a goal that would economically inure to the defendants' benefit, and therefore reasonably exclude the possibility that defendants acted independently. *See Seagood Trading, supra*, 924 F.2d at 1574; *Bolt, supra*, 891 F.2d at 819 (citations omitted). To make this showing, the plaintiff must adduce evidence "that tends to exclude the possibility that the alleged co-conspirators acted independently and in a manner consistent with rational business objectives." *Bolt, supra*, 891 F.2d at 819 (citations omitted). This means that conduct which is as consistent with permissible, unilateral activity as with an illegal conspiracy does not, standing alone, permit the inference of an antitrust conspiracy. *Matsushita Elect. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588, 106 S.Ct. 1348, 1356, 89 L.Ed. 2d 538 (1986); *Seagood Trading, supra*, 924 F.2d at 1574.

The plaintiff need not show a specific intent to restrain trade or to build a monopoly, however. *Id.* at 819-20. "So long as the purported conspiracy has an anticompetitive effect, the plaintiff has made out a case under Section 1." *Id.* at 820. Therefore, in determining whether a conspiracy exists, if an economic motive is evident, the plaintiff need only show (1) a conscious commitment on the part of the alleged conspirators to

adhere to an agreement that is (2) designed to achieve an objective prohibited by the statute. *Id.*

Once the plaintiff makes out a conspiracy, the court must decide whether the agreement had an adverse impact on competition. *Seagood Trading Corp. v. Jerrico, Inc.*, 924 F.2d 1555, 1570 (11th Cir. 1991). Certain conspiracies are deemed to have such a pernicious effect on competition, that they are said to be illegal "per se". *Id.* at 1567. "[T]hat is, the conduct involved 'always or almost always tends to restrict competition and decrease output'" without any countervailing procompetitive benefits. *Id.* (*quoting Northwest Wholesale Stationers, Inc. v. Pacific Stationery Printing Co.*, 427 U.S. 284, 289-90, 105 S. Ct. 2613, 2617, 86 L. Ed. 2d 202, 208 (1985) (citation omitted)). The Supreme Court has made it clear that the "per se" label should be applied infrequently and with caution. *Id.* (*citing Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 723, 108 S. Ct. 1515, 1519, 99 L. Ed. 2d 808, 816 (1988)). Therefore, the presumption in Section 1 cases is that the "rule of reason" standard applies. *Id.* at 1567.

The rule of reason asks whether, in the circumstances of a particular case, a restrictive practice imposes an unreasonable restraint on competition. *Seagood Trading Corp.*, *supra* at 1569 (citations omitted). A restraint is "unreasonable" if it has an adverse impact on competition and cannot be justified as a procompetitive measure. *Id.* Thus, "[t]he rule of reason standard hinges the ultimate legality of a restraint on whether the plaintiff has demonstrated an anticompetitive effect which is not offset by a need to achieve a procompetitive benefit or Justification." *Id.* at 1569 (quoting from *Kesterbaum v. Falstaff Brewing Corp.*, 575 F.2d 564, 571 (5th Cir. 1978).

In order to show an injury to competition using the rule of reason analysis, the plaintiff first must establish a "particularized or relevant market in which the defendant's actions unreasonably restrain trade." *L.A. Draper & Son v. Wheelabrator-Frye, Inc,*, 735 F.2d 414, 422 (11th Cir. 1984). The relevant market is defined generally as the "area of effective competition." *Brown Shoe Co. v. United States*, 370 U.S. 294, 324, 82 S. Ct. 1502, 1523; 8 L. Ed. 2d 510, 535 (1962). The market must contain both a product dimension and a geographic dimension. *L.A. Draper, supra*, 735 F.2d at 423. The product dimension is "determined by the availability of substitutes to which consumers can turn in response to price increases and other existing or potential producer's ability to expand output." *Id.* The geographic dimension is "the area in which the product or its reasonably interchangeable substitutes are traded." *Id.*

Once a plaintiff has established the relevant market, the rule of reason analysis focuses on the defendants' power within the market. The meaning of market power in rule of reason cases has not been clearly explained or defined by the Supreme Court. However, I agree with Judge Posner's description of market power as the "power to raise price above the competitive level without losing so many sales that the price increase would be unprofitable." *Morrison v. Murray Biscuit Co.*, 797 F.2d 1430, 1435 (7th Cir. 1986) (citations omitted).

As described above, Dr. Williamson alleges a swirl of conspiracies. First, she contends that Sacred Heart conspired with PRC, Dr. Post, and others to prevent her from competing for radiology patients. Next, she alleges a similar conspiracy among Baptist, Radiology Associates, and unnamed others for that same purpose. Finally, she asserts that there was a

"community wide" conspiracy among all the defendants to prevent her from gaining membership in Health First, which effectively disqualified her from treating HOP subscribers, and thereby prevented her from competing for patients in need of radiology services.

Dr. Williamson's argument proceeds from the premise that rational economic actors in the defendants' positions would have accommodated her various requests for privileges. Their failure to do so, according to Dr. Williamson, is evidence that they acted in a manner inconsistent with rational economic objectives, and hence conspired to drive her out of the market.

1. PRC, Sacred Heart and Dr. Post Conspiracy

As previously noted, there is no direct evidence that PRC, Dr. Post, and Sacred Heart conspired to prevent Dr. Williamson from competing for radiology patients. Accordingly, the plaintiff relies entirely on circumstantial evidence of (a) defendants' failure to accommodate Dr. Williamson's requests for staff privileges, and (b) Sacred Heart's attempts to "blackball" Dr. Williamson.

(a) Denial of Staff Privileges. (i) *The Bolt Case*: In *Bolt v. Halifax Hospital Medical Center*, 891 F.2d 810 (11th Cir. 1990), the Eleventh Circuit held that the denial or revocation of hospital privileges are presumed to be economically motivated, and are, therefore, evidence of an economic conspiracy between the defendant hospital and its staff. In such a case, the plaintiff need only show a conscious commitment to the agreement and that the agreement was designed to achieve an anticompetitive effect.

In *Bolt*, the plaintiff was granted probationary privileges at each of three hospitals. At the end of the probation period, one of the hospitals conditioned the plaintiff's reappointment to the active staff on his agreement to seek psychiatric counseling through the Impaired Physicians Program operated by the Florida Medical Association. Shortly thereafter, the remaining two hospitals denied reappointment.

In reversing a directed verdict in favor of the defendant hospitals, the Eleventh Circuit held that hospitals and doctors always have a "rational economic motive" sufficient for antitrust purposes when they deny or revoke a physician's privileges. *Id.* at 820. Relying solely on a simplified application of the inverse relationship between supply and demand and a law review article, and without citation to any legal authority, the court seems to presume that excluding a physician from practice in a hospital always allows the remaining doctors to charge a higher price. *Id.*

Bolt, however, is distinguishable from this case. It does not address the role of exclusive contracts in the staffing of hospital diagnostic facilities; nor does it deal with the role of HMO participation in the granting of privileges. In addition, presumed that the physician subject to denial of privileges was facially qualified under the hospital bylaws to practice medicine within the relevant department. In this case, there is no question that Dr. Williamson had the medical training necessary to qualify for privileges in the Department of Radiology. But there is no legal impropriety claimed or shown regarding Sacred Heart's exclusive contract with PRC, so it is undisputed that plaintiff is not entitled to have regular radiological privileges. Instead, Sacred Heart denied her amended and second applications for privileges in the Department of Internal

Medicine on the ground that her medical training in radiology was insufficient under the bylaws to qualify her for privileges in the Department of Internal Medicine.

I realize that plaintiff is challenging Sacred Heart's reliance on the bylaws on the grounds that it was pretextual. Nevertheless, the fact that plaintiff's medical credentials have been questioned, along with the other factors mentioned above, makes application of the *Bolt* "economic motive" presumption to this case inappropriate. Accordingly, I must review all the evidence in the record to determine whether there is any genuine issue of material fact concerning the existence of an antitrust motive.

(ii) The Exclusive Contract: Preliminarily, as noted above, Dr. Williamson does not, and cannot, challenge the exclusive contract between PRC and Sacred Heart on the grounds that, by itself, it establishes a violation of Section 1 of the Sherman Act. *Jefferson Parish Hospital v. Hyde*, 466 U.S. 2, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984). To the contrary, it is well established that such contracts are completely consistent with rational economic objectives. For example, the exclusive contracts in this case ensure that a radiologist will be available 24 hours a day, 365 days a year, thereby minimizing the risk of treatment delays. Dealing with a single radiology group also allows Sacred Heart to offer continuous, high quality care with a minimum of administrative effort. In this way, the exclusive contract "preserve[s] the efficiency of the department's operation and thus its ability to compete in the market place." *Todorov v. DCH Healthcare Authority*, 921 F.2d 1438, 1458 (11th Cir. 1991).

Since the exclusive contract itself is facially pro-competitive, it follows that the denial of Dr. Williamson's initial application for privileges in the Department of Radiology on the grounds that it violated the contract also was a facially pro-competitive measure. Therefore, it is not circumstantial evidence of an antitrust conspiracy between PRC and Sacred Heart.

(iii) Exclusive Contract as a Pretext: According to plaintiff, her services were so desirable to both Sacred Heart and PRC that a rational economic actor in their position would have jumped at the chance to bring her on board. Faced with the exclusive contract and the apparent bylaws restrictions, rational business objectives should have compelled them to find a way to work around these obstacles. Accordingly, plaintiff contends that Sacred Heart invoked the exclusive contract as a pretext to delay, and later to deny, her initial application for privileges in radiology. Sacred Heart then used the contract as a pretext to trick her into requesting privileges in the Department of Internal Medicine.

Plaintiff correctly points out that both Dr. Post and Dr. Whitcomb admitted that the exclusive contract involved only the use of imaging modalities at the hospital. In addition, they acknowledged that the procedures Dr. Williamson wished to perform (i.e. admit patients, consult with them and the attending physician, do physical histories and medical exams, give medical advise, and review and make notations on patients' charts) were not radiology procedures within the meaning of the contract and did not require radiology privileges. In fact, any member of the staff could perform these procedures.

It is plaintiff's assessment that, under these circumstances, the economically rational decision would have been to give her privileges necessary to allow her to perform those patient care procedures not covered by the exclusive contract while imposing whatever limitations were required to protect those procedures reserved exclusively to PRC. She contends that the defendants' failure to accommodate her in this manner is not only evidence that their reliance on the contract was pretextual, but also that they conspired to drive her out of the outpatient radiology market. I cannot agree.

Plaintiff's argument is fundamentally flawed in that it completely ignores the fact that Sacred Heart was committed to opening the Ann Baroco Center. Under its exclusive contract, PRC would be the beneficiary of the center's business. It is undisputed that plaintiff's clinic competed with Sacred Heart for outpatient radiology referrals and that plaintiff herself competed with the physicians of PRC. The opening of its own women's center would place Sacred Heart and PRC into even more direct competition with plaintiff.

In fact, the undisputed evidence establishes that, since Baptist then had no plans to open a women's center, Pensacola Diagnostic would be the Baroco Center's primary competitor. The undisputed evidence in the record also indicates that Dr. Williamson was a very formidable competitor. In two years she carved out a specialty that brought her substantial remuneration. Before the Baroco Center opened, Pensacola Diagnostic's revenues were three times those of Sacred Heart for procedures and services encompassed by Dr. Williamson's specialty. As late as 1989, a full two years after opening the Baroco center, Dr. Williamson's revenues were still greater than those of Sacred Heart for the procedures encompassed by

Dr. Williamson's specialty. Furthermore, Dr. Williamson's specialized practice grew rapidly: between 1986 and 1989 the number of breast exams that she performed more than doubled from 2007 to 4421.

In light of plaintiff's position in the market, granting her any type of privileges while she still operated her own clinic would put Sacred Heart in the position of supporting its main competition. Essentially, Sacred Heart would be competing with itself. Faced with this possibility, it clearly had a rational, pro-competitive reason for acting independently to deny Dr. Williamson's request for privileges

Dr. Williamson counters that if PRC and Sacred Heart were acting rationally, they would have tried to "neutralize" her by merging with her. Accepting plaintiff's assertion that the relevant product and geographic markets at issue in this case are outpatient mammography in the greater Pensacola area, her argument for merging the only two significant competitors in that market would seem to have its own antitrust implications.

Putting this telling point aside, it is undisputed that PRC, with Sacred Heart's approval, did in fact enter into negotiations to hire Dr. Williamson. As discussed above, the parties were not able to reach an agreement. In particular, Dr. Williamson did not want to work nights, weekends, or holidays. PRC was willing to accommodate her schedule in exchange for a reduction in salary, but Dr. Williamson rejected the proposed amount as too low.

Similarly, Dr. Williamson had justifiable misgivings about the interaction between the non-compete covenant and the termination clause. Observing that, taken together, the two

clauses could allow PRC to put her out of practice in Pensacola in as little as three months, Dr. Williamson asserts that these negotiations were not "genuine". She characterizes PRC's written offer as a "take it or leave it" proposition and characterizes the proposed contract as a "sham". In addition, plaintiff contends that Dr. Post wanted her to change her style of practice.

It is true that the termination clause and the non-compete clause could have harsh consequences. But such clauses are commonly utilized by professional practices, and there is no evidence that they were specifically directed toward plaintiff. Even if I accept plaintiff's contention, arguendo, that the proposed contract was a thinly disguised attempt to lure her into a professional trap, I cannot conclude that PRC's conduct was evidence of an antitrust conspiracy.

It is undisputed that PRC and Pensacola Diagnostic were direct competitors. I also accept the fact that PRC rationally could have chosen to address this competition by merging with Pensacola Diagnostic or by hiring Dr. Williamson. However, in her zeal to isolate economic irrationality, plaintiff appears to take the position that any action on the part of PRC and Sacred Heart short of a complete accommodation through a merger is circumstantial evidence of concerted action. She ignores the fact that PRC just as rationally could have chosen to compete with her. Clearly, the proposed Baroco Center would be a more than ample foundation upon which to base such a choice.

PRC could choose to compete by offering superior service or a lower price. Similarly, PRC rationally could choose to compete through its long term relationship with Sacred Heart. If so, that is <u>not</u> evidence of an antitrust

conspiracy unless the method itself is inconsistent with both independent action and rational business objectives, even if deemed to be unfair. *L.A. Draper & Sons v. Wheelabrator-Frye, Inc, supra,* 735 F.2d 414, 421 (11th Cir. 1984). "The use of unfair means in substituting one competitor for another without more does not violate the antitrust laws." *Id.* (citations omitted).

In this case, it is perfectly rational for PRC to attempt to compete with the plaintiff. After all, competition is what the antitrust laws are supposed to promote:

> Who says that competition is supposed to be fair, that we judge the behavior of the marketplace by the ethics of the courtroom? Real competition is bruising rivalry, in which people go out of business under intense pressure. . . . [C]ompetition is a gale of creative destruction.

Fishman v. Estate of Wirtz, 807 F.2d 520, 577 (7th Cir. 1986) (Easterbrook, J., dissenting).

Moreover, there is no evidence that Sacred Heart influenced PRC's negotiating posture. Sacred Heart did encourage PRC to choose a female physician to service its new women's center. In fact, there is even evidence that it encouraged PRC to reach an agreement with Dr. Williamson, perhaps for the same reason. However, PRC conducted the negotiations through its own counsel, and there is no evidence that Sacred Heart had any control over, or participation in, PRC's ultimate choice. For these reasons, I must conclude that the conduct of both Sacred Heart and PRC in denying plaintiff's

request for privileges, and in failing to come to a contractual agreement with her, are at least as consistent with rational, independent business conduct as with an antitrust conspiracy, as *Matsushita* requires on motions for summary judgment.

In further support of her pretext argument, plaintiff points to so-called "accommodations" that Sacred Heart made for other physicians whose areas of specialty were covered by "exclusive" contracts. However, a brief examination of these "accommodations" reveals that they bear no resemblance to plaintiff's situation. For instance, the Department of Gastroenterology and the Department of Pulmonology are both subject to exclusive contracts. The exclusive contract applicable to the former specifically preserved the staff privileges of six gastroenterologists who were not parties to the contract.

The exclusive contract associated with the Department of Pulmonology provided that

> the termination or cancellation of this agreement shall not affect the staff membership or clinical privileges of any physician employee of the group, except that such physician employee may not thereafter obtain or exercise any clinical privileges for which exclusive contractual arrangements have been made between the hospital and a third party.

Thus, the pulmonologists in question would retain their staff membership, as well as the privilege to perform any service not specifically named in the exclusive contract. Similarly, Sacred Heart's exclusive contract with Dr. Frank for the provision of

neurological services states that exceptions may be made after consultation and joint approval of Dr. Frank and the hospital.

These contracts show only that the parties involved negotiated certain exceptions to their exclusive rights. Whatever factors led to the inclusion of these terms are unknown, but make them clearly distinguishable from the plaintiff's circumstances. In addition, each contract was an independent event completely unrelated either to the PRC contract or to Dr. Williamson's applications for staff privileges. For these reasons, they cannot be evidence that the denial of plaintiff's request was anomalous, and therefore, pretextual. It is simply not reasonable to infer a conspiracy from the fact that these contracts are different from the PRC contract.

The case of independent radiologist Thomas Brown, M.D. presents a somewhat different situation. Between 1975 and 1980, Dr. Brown practiced with PRC at Sacred Heart, and consequently, had full privileges there. When he left PRC in 1981 to open his own radiology clinic, Sacred Heart permitted him to retain his privileges. No objection to this arrangement was raised until 1984, when Sacred Heart told Dr. Brown he would have to resign his membership or face revocation proceedings.

Sacred Heart claims that it did not realize that Dr. Brown had retained his privileges, and that when it discovered the error, it asked him to resign. Plaintiff contends that Sacred Heart forced Dr. Brown to resign only after it discovered that his having privileges allowed him to compete for Blue Cross/Blue Shield PRC patients. Which interpretation is more accurate is immaterial. The material fact is that when Dr. Williamson submitted her application for privileges,

Dr. Brown's privileges had been revoked. Thus, Dr. Williamson and Dr. Brown received the same treatment.[38]

Plaintiff's strongest argument involves the case of obstetrical ultrasound. Traditionally, this procedure was performed by radiologists. However, developments in the procedure and in the medical profession made it more common for obstetricians to perform it. In 1986, Sacred Heart determined that it was in its best interest to respond to these changes by hiring a perinatologist (a specialist in high-risk pregnancies) to perform obstetrical ultrasounds at the hospital. Initially, PRC objected to this arrangement on the basis of its exclusive contract. Nevertheless, Sacred Heart and PRC eventually reached an agreement to modify the exclusive contract to permit the perinatologist to perform obstetric ultrasounds.

Dr. Williamson argues that a similar transformation was occurring in the detection and treatment of breast cancer, Therefore, she contends that an accommodation along the lines of that made for the perinatologists could have, and should have, been made for her. This brings us back to the core of plaintiff's argument, which is that Sacred Heart's failure to accommodate her practice was economically unsound and was antitrust conduct. Once again, this argument ignores the fact that Sacred Heart had a rational business reason, in the form of its own Ann Baroco Center, for refusing to accommodate plaintiff. Failure to make special exceptions to established

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[38]Of course, plaintiffs argue that the treatment itself was evidence of a conspiracy. I address this issue below. Right now I am only dealing with plaintiff's argument that her treatment was anomalous, and therefore, evidence of pretext. The evidence shows that, with respect to Dr. Brown, it was not.

policy in order to accommodate a competitor is not antitrust behavior.

(iv) Unilateral Conduct and Causation: Even if I were to accept plaintiff's evidence of pretext as true, such evidence, standing alone, would not be sufficient to show joint action in violation of the antitrust laws. *DeLong Equipment Co. v. Washington Mills Abrasive Co.*, 887 F.2d 1499, 1514 (11th Cir. 1989). Rather, evidence of pretext only serves to rebut an assertion of independent action on the part of the defendant. *Id.* In this case, however, plaintiff's argument overlooks the fact that the final authority to grant privileges or to waive bylaws requirements lies solely with Sacred Heart's Board of Directors. The Board of Directors also has the sole authority to negotiate contract modifications.

The Eleventh Circuit faced a similar set of facts in *Todorov v. DCH Healthcare Authority*, 921 F.2d 1438 (11th Cir. 1991). In that case, the plaintiff neurologist brought an antitrust claim against a hospital and its radiologists. The plaintiff had applied for privileges to perform CT scans in the hospital's radiology department. The radiologists, who had developed numerous protocols for this Procedure, recommended that the application be denied. The hospital followed this recommendation, and the neurologist filed his antitrust claim.

The court held that even if the radiologists had conspired among themselves to deprive the neurologist of privileges, they could not have caused his application to be denied. *Id.* at 1459. Only the Board of Directors could deny the application. Therefore, such denial was a unilateral action on the part of the hospital. *Id.* As with all tort-like causes of

action, the failure to show causation is fatal to a Section 1 claim. *Id.*

To the extent that PRC was involved in the denial of plaintiff's request for privileges, its participation was limited to the comments that Drs. Post and Hobgood made in December of 1985, in opposition to Dr. Williamson's original application for privileges in the Department of Radiology. None of PRC's physician employees sat on the Sacred Heart's Board, and none of them played any part in the drafting of the Department of Internal Medicine's credentialling criteria. Furthermore, with the exception of Dr. Post, who sat on the Executive Committee, none of the PRC physicians sat on any of the committees that reviewed plaintiff's application.

Plaintiff points out that all of the physicians sitting on the Credentials and Executive Committees considered Dr. Williamson a skilled practitioner, and many referred patients to her. Some were in favor of adding her to the staff, and they lobbied on her behalf with both the hospital and the Department of Radiology. Accepting plaintiff's interpretation of the facts as true, these physicians, though they personally wanted to see her on the staff, ultimately were constrained by the bylaws and were forced to recommend that her application be denied. Nevertheless, support for Dr. Williamson is evident from the occasions that the Credentials Committee, despite its adverse recommendation, continued to encourage the hospital to accommodate Dr. Williamson's practice. But, as in the *Todorov* case, the decision with regard to these matters constitutes unilateral action on the part of Sacred Heart, and does not implicate an antitrust conspiracy.

(b) Attempts to Blackball Dr. Williamson. The alleged attempts to "blackball" Dr. Williamson are much more difficult to analyze. These attempts fall into three main categories. First, there are the alleged attempts to attack Dr. Williamson's referral base through coercive reciprocal agreements with other physicians, as well as through the use of threats and pressure to force physicians to refer patients back to Sacred Heart. Second, there is the evidence relating to the needle placement controversy. Third, there is the alleged pressure on Pensacola Pathologists to fire Dr. Michael Williamson.

(i) Attacks on Dr. Williamson's Referral Base: Plaintiff's allegations of threats and pressure are based almost entirely on her own hearsay testimony describing what other physicians allegedly told her about what Sacred Heart administrators, in turn, told them.

Insofar as plaintiff offers her own testimony to prove that Sacred Heart, in fact, intimidated or coerced the named physicians, it is clearly inadmissible hearsay. Recognizing this fact, plaintiff argues that this testimony nevertheless is admissible as circumstantial evidence to show the state of mind of the declarant physicians. However, the plaintiff misunderstands the state of mind rule regarding what would otherwise be hearsay: it's the state of mind of the secondary declarant that must be affected without regard to the truth or falsity of the statement. In short, it does not apply to the declarant physicians. Even if it did, it does not assist plaintiff in establishing the existence of a conspiracy to blackball her. To the extent that the alleged statements may be circumstantial evidence of the physicians' states of mind, they would be admissible only for the purpose of inferring the conduct of the

declarant physician, not to infer conduct on the part of Sacred Heart. Therefore, plaintiff must establish the conspiracy through other admissible evidence.

Plaintiff attempts to do this through proof of the circumstances surrounding the several contracts between Sacred Heart and the declarant physicians. Essentially, plaintiff argues that the contracts between Sacred Heart and Drs. Horan, Turner, Antonelli, Howard and Mixon were coercive reciprocal agreements requiring the physicians to refer patients back to Sacred Heart in exchange for much needed financial support.

As the Eleventh Circuit observed in *Key Enterprises of Delaware, Inc. v. Venice Hospital*, 919 F.2d 1550, 1561 (11th Cir. 1990), "reciprocal dealing has received little attention in the courts; however, when the subject has arisen, courts have not hesitated to condemn the practice." Reciprocal dealing is conceptually similar to tying. *Id.* In a tying arrangement, a seller uses its power in the market for product A to coerce the buyer of product A to purchase product B. *Id.* However, "[a] reciprocal dealing arrangement exists when the two parties face each other as both buyer and seller." *Id.* (*citing Spartan Grain & Mill Co. v. Ayers*, 581 F.2d 419, 424 (5th Cir. 1978). The buyer of product A offers to buy from the other party, but only if that second party will buy product B from the first party. *Id.* The two cases are similar in that, in each case, one side of a transaction has special power in the market place . . . [i]n reciprocal dealings, a buyer with economic power forces a seller to buy something from it." *Id.*

The difference between the two types of arrangements is that the strict standard of coercion applied to tying cases is not applicable to reciprocal dealing cases. *Id.* If the coercion

necessary for *per se* treatment is not present, the court may analyze the case under the rule bf reason. *Id.* Therefore, "where a plaintiff shows that one party has sufficient market power to unduly influence a second party to treat the first more favorably than the free market would otherwise dictate, and the second party acts in conformity with the reciprocal arrangement, the plaintiff has proved the existence of an arrangement which unreasonably restrains trade." *Id.*

In *Venice Hospital, supra*, the Eleventh Circuit determined that it was appropriate to allow the jury to determine the existence of a coercive reciprocal agreement where the evidence showed that the defendant hospital entered into agreements with one or more home health care agencies whereby the home health care nurses would have access to patients prior to discharge in exchange for the nurses preferentially referring their patients to Medical Patient Aid Center ("MPAC"), a hospital owned company that supplied "durable medical equipment" ("DME") for home use. *Id.* 919 F.2d at 1561. At the time it entered into the agreement, the defendant hospital was the dominant hospital in the area. It controlled 76% of the available hospital beds, 80% of patient admissions, and 81% of the patient days in the relevant geographic market.

The defendant hospital also was the source of at least 46% of the total market for durable medical equipment. In the two-year period beginning with the agreement between the MPAC and the home health care agencies, MPAC's total market share rose from 9.2% to 61%. A total of 64% of MPAC's business originated with a referral from a home health care nurse counseling patients at the defendant hospital. Thus,

MPAC got a large part of the market simply by capturing a large percentage of the defendant hospital's referrals.

Under these facts, the court concluded that although the arrangement did not fit precisely the contours of the classical reciprocal agreement, it had sufficient representative elements to allow the issue to go to the jury. *Id.* at 1562. An important aspect of the court's decision is the factual showing of the hospital's monopoly power within the relevant geographic market - - - 80% of the hospital patients and in excess of 46% of the "durable medical equipment" market.

Here, plaintiff contends that, similarly, Sacred Heart has entered into agreements with several physicians whereby Sacred Heart provides financial support to their practices in exchange for, or in expectation of, the physician's referral of patients back to Sacred Heart for outpatient services, including radiology services.[39] Defendants, of course, argue that these contracts contained nothing that constitutes an arrangement which unreasonably restrains trade.

In the case of Drs. Horan, Turner, and Antonelli, the contracts with Sacred Heart contain language requiring them to utilize Sacred Heart's outpatient services "to the extent feasible, and unless patient choice dictates otherwise."[40] In the case of Drs. Howard the so-called "utilization" clauses provides that "Gulf Coast Diversified (Sacred Heart's for-profit affiliate) shall

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[39]I note that plaintiff never uses the term "coercive reciprocal agreement" in her pleadings or opposition to defendants' several motions.

[40]The wording of Dr. Antonelli's contract is slightly different, and reads "to the extent feasible, and in accordance with acceptable medical practice, and unlest patient choice dictates otherwise."

be notified of any referral of patients . . . for medical services to any entity other than Sacred Heart Hospital of Pensacola." In addition, it provides that "[Dr. Howard] agrees to utilize specialty physicians who are members of the medical staff of Sacred Heart Hospital of Pensacola wherever practical to ensure continuity of patient care." Dr. Mixon's contract contains the same utilization clause, but with the additional specific requirement that he utilize radiology services provided by Sacred Heart unless Sacred Heart instructs him to use an outside radiologist.

Factually, as previously noted Dr. Mixon and Dr. Howard had no history of any referrals to plaintiff, and there is nothing to tie their agreements to this case. Dr. Antonelli said he always referred his patients requiring a radiologist to the plaintiff and that his agreement with Sacred Heart had no effect on referrals. The statistics regarding Drs. Horan and Turner are basically inconclusive, but they each deny any pressure to move referrals from plaintiff to Sacred Heart.

Nevertheless, the question remains as to whether the potential restraint imposed by these agreements was unreasonable. Plaintiff argues that the coercion involved was sufficient to allow application of the *per se* rule. I cannot agree.

A coercive reciprocal agreement, like a tying agreement, is unreasonable *per se* whenever one party has sufficient economic leverage in one market to gain an unfair advantage in another market. *See Venice Hospital, supra*, 919 F.2d at 1560-64; *Betasee, Inc. v. U and I, Inc.*, 681 F.2d 1203, 1216-18 (9th Cir. 1982); *Spartan Grain & Mill Co. v. Ayers*, 581 F.2d 419, 425-26 (5th Cir. 1978). In this case, the

products exchanged are loans and financial credit on the one hand, and outpatient referrals of all types on the other hand. There is no evidence in the record whatsoever relating to Sacred Heart's leverage in the lending or financial market.

The Supreme Court addressed this very issue in *United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610, 97 S. Ct. 861, 51 L. Ed. 2d 80 (1977) ("*Fortner II*"). In that case, a subsidiary of U.S. Steel offered 100% financing to Fortner for the purchase of prefabricated homes manufactured by U.S. Steel. The financing was at particularly low rates, and on terms favorable to Fortner. The financing was available, however, only on sales of homes from U.S. Steal to Fortner. The homes themselves were more expensive than those of U.S. Steel's competitors. The relationship between Fortner and U.S. Steel soured, and Fortner brought an antitrust action contending that the credit had been tied to the purchase of the homes in violation of Section 1 of the Sherman Act.

The only issue before the Supreme Court was whether Fortner had shown that U.S. Steel had economic power in the market for credit, not the market for prefabricated homes. Ignoring several other arguments, including the size of U.S. Steel and the number of similar arrangements it had made, the Supreme Court determined that the question came down to one of uniqueness:

> The most significant finding made by the District Court related to the unique character of the credit extended to Fortner. This finding is particularly important because the unique

> character of the tying product has provided critical support for the finding of illegality in prior cases.

Id. at 619, 97 S. Ct. at 867, 51 L. Ed. 2d at 89. "In short, the question is whether the seller has some advantage not shared by his competitors in the market for [credit]." *Id.* at 620, 97 S. Ct. at 868, 51 L. Ed. 2d at 89-90.

The fact that the financing arrangement was unique, i.e. "without like or equal", did not mean that U.S. Steel possessed economic power. The Court concluded that the evidence merely showed that the credit terms were unique because the seller was willing to accept a lesser profit, or to incur greater risk, than its competitors. This kind of uniqueness did not give rise to an inference of economic power. Without any evidence that U.S. Steel had some cost advantage over its competitors - - - or could offer a form of financing that was significantly differentiated from that which other lenders could offer if they so elected - - - the unique character of the financing did not support the conclusion that U.S. Steel had the kind of economic power that would sustain a finding of *per se* illegality. *Id.* at 621-22, 97 S. Ct. at 868, 51 L. Ed. 2d at 90-91.

Assuming that the relevant geographic market in this case, <u>for this issue</u>, is the greater Pensacola area, there is no evidence in the record to support the conclusion that Sacred Heart had some competitive advantage over other potential lenders. Common sense requires a contrary conclusion. The fact that the physicians in question felt that they could not get as good a deal at a bank, for example, is irrelevant to my inquiry under *Fortner II*. *See also Spartan Grain, supra*, 581

F.2d at 425-27 (*citing Fortner II*). Accordingly, I must conclude that application of a *per se* analysis to the reciprocal agreement alleged in this case is inappropriate.

In order to prevail in the absence of *per se* liability, plaintiff must show that Sacred Heart's conduct unreasonably restrained competition. *Jefferson Parish Hospital v. Hyde*, 466 U.S. 2, 29, 104 S. Ct. 1551, ____, 80 L. Ed. 2d 2, 23 (1984); *Venice Hospital, supra*, 919 F.2d at 1562. In the absence of evidence of actual detrimental effects, the rule of reason dictates that the plaintiff define the relevant market (both its product and geographical boundaries), as well as demonstrate the defendant's market power. As discussed above, there is no evidence that Sacred Heart's power in the lending and financial market was sufficient to restrain trade within the greater Pensacola area.

In the alternative, even assuming, as plaintiff seems to argue, that the relevant product market is not access to credit, but access to hospital services, she has still failed to meet her burden. As discussed above, the Eleventh Circuit's decision in *Venice Hospital, supra*, 919 F.2d at 1550, was based, in large part, on the factual showing of the hospital's monopoly power within the relevant geographic market - - - 80% of the hospital patients and in excess of 46% of the "durable medical equipment" market.

Unlike the defendant in *Venice Hospital*, Sacred Heart has no unreasonable ability to control access to hospital services. It is undisputed that Sacred Heart and its two main competitors, Baptist and West Florida Regional Hospital ("West Florida"), compete neck and neck within the greater Pensacola

area.[41] The Navy Hospital and (at the relevant time) University Hospital were also competitors within the Pensacola market. There is nothing to indicate that Sacred Heart was able to exert any control over this market.

(ii) The Needle Placement Controversy: Next, plaintiff argues that banning her needle placement patients from its surgi-center is circumstantial evidence of an antitrust conspiracy.

Essentially, plaintiff argues that her needle placement protocol, involving as it did, the placement of the needle at her clinic and then walking the patient across the parking lot to the surgi-center for removal, presented no greater risk to the patient or to the specimen once removed than did Sacred Heart's own protocol. once again, plaintiff has overlooked the fact that she was in competition with Sacred Heart. As discussed above in greater detail, there is nothing in the antitrust law that mandates aid to a competitor.

In addition, there is another, procompetitive reason for the advisory board's recommendation: Dr. Williamson is outside Sacred Heart's quality assurance mechanism. It is true that Sacred Heart routinely receives specimens from outside the hospital. However, when Sacred Heart takes in specimens from physicians who are on its staff, it has the power to enforce

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[41] Although it is not a part of the record, the affidavit of plaintiff's own expert establishes, by way of comparison, that Sacred Heart has only 28.3% of patient days, while Baptist and West Florida have 29.8% and 31.4%, respectively. Similarly, Sacred Heart has only 21.6% of the available beds, while Baptist and West Florida have 28.9% and 30.4%. Finally, Sacred Heart has 35.8% of the admissions, while Baptist and We is Florida have 24.6% and 27.64, respectively.

compliance with its quality assurance protocol. Similarly, when Sacred Heart sends its own specimens to an outside lab, it has control over the choice of labs and may adjust its choices as quality concerns dictate. It also has control over its couriers and the means of transport.

Under plaintiff's proposed needle placement protocol, Sacred Heart has no such control. She is outside its review and, more importantly, its enforcement mechanisms. If legitimate questions arise or problems occur, Sacred Heart's only recourse would be to discontinue plaintiff's use of wits surgery and lab facilities. After weighing the risks and benefits of plaintiff's proposal, this is precisely what it did. The fact that the decision may have made plaintiff's needle placement practice less desirable for plaintiff to use does not detract from the legitimacy or reasonableness of the decision. Nor does it create an inference of an antitrust conspiracy.

(iii) Termination of Michael Williamson: As with her allegations of intimidation, plaintiff's contention that Pensacola Pathologists terminated Michael Williamson under pressure from Sacred Heart is almost entirely based on plaintiff's own and her husband's hearsay testimony. That evidence cannot be considered for purposes of the pending motion.

The admissible evidence in the record is what the doctors themselves have testified: that they were under no pressure from Sacred Heart, and that their termination of Michael Williamson had nothing to do with the delay in the renewal of their contract. Therefore, this does not support the plaintiff's antitrust claim. Further, Dr. Michael Williamson is

not a party to this action. Any claim he may have is in a separate case in state court.

(iv) Involvement of PRC and Dr. Post: I must now assess the involvement of PRC and Dr. Post in all these activities. The evidence of PRC's and Dr. Post's attempts to intimidate physicians into using the Sacred Heart outpatient radiology facilities consists of Dr. Murphy's statement to the FTC. According to Dr. Murphy, Dr. Post attempted to persuade him to refer his patients to the Sacred Heart radiology department by appealing to his sense of loyalty to the hospital. Assuming that it occurred, this attempt to lobby Dr. Murphy can hardly be characterized as a threat. A threat implies the ability to harm. In this case, Dr. Post and PRC had no ability to harm Dr. Murphy's practice.

Similarly, there is no evidence that PRC or Dr. Post participated in the negotiation of the pathology contract, or of the allegedly coercive reciprocal agreements with Dr. Williamson's referring physicians. It is true that PRC stood to benefit from these arrangements, but so did all of Sacred Heart's other outpatient diagnostic facilities. Even if they knew about Sacred Heart's conduct, and hoped that it would succeed in diverting referrals back to the hospital, the fact that PRC and Dr. Post would benefit from Sacred Heart's allegedly improper actions is not evidence that they participated. More importantly, there is no evidence whatsoever, that PRC or Dr. Post was in position to influence Sacred Heart's lending and contract decisions.

Finally, the participation of PRC and Dr. Post in the alleged scheme to ban Dr. Williamson's needle placement patients was limited to Dr. Post's role as an advisor to the

Medical Advisory Board. The evidence shows that in this capacity he did nothing more than describe the needle placement process. He was not a member of the board, and had no vote in the matter. Similarly, no other physician employee or shareholder of PRC sat on the board. For these reasons, I must conclude that the evidence is insufficient to link either PRC or Dr. Post to a conspiracy to drive plaintiff out of business or to limit her ability to compete for radiology patients.

(v) Summation: In sum, there is no genuine issue of material fact in the record as to whether the defendants PRC, Sacred Heart, and Dr. Post conspired to violate Section 1 of the Sherman Act, and these defendants' motions for summary judgment are GRANTED.

2. Baptist and Radiology Associates Conspiracy

As with the Sacred Heart/PRC conspiracy, there is no direct evidence that Baptist and Radiology Associates conspired to prevent plaintiff from competing for radiology patients. Moreover, the plaintiff's circumstantial evidence relating to this conspiracy is quite limited.

Plaintiff's application for privileges at Baptist is distinguished not only by the fact that Radiology Associates interposed no objection, but also by the fact that Baptist eventually gave the plaintiff the privileges that she requested. Plaintiff argues that the process was delayed for three years. However, she ignores the fact that two and one-half years of that delay are attributable to her own lack of diligence. The events prior to February 25, 1988, are simply not relevant to plaintiff's claim against Baptist. There was no delay that can be attributable to anyone except the plaintiff.

Plaintiff next interposes the specious argument that Baptist did not give her all the privileges she requested. In other words, Baptist failed to accommodate plaintiff on her terms. She claims that this is evidence of an antitrust conspiracy. I do not agree.

Based on plaintiff's representations to the hospital, Baptist made the precise accommodation she had been seeking. Plaintiff requested privileges that would allow her to provide specific follow up care to the patients she saw at her clinic. Within five months of her renewal application in February 1988, Baptist granted plaintiff full courtesy privileges under supervision. It is undisputed that these privileges satisfied the professional needs plaintiff had expressed to Baptist, and that were known to it at the time.

Upon granting these privileges, Baptist explained that the interaction of the bylaws' practice requirement and the exclusive contract with Radiology Associates, plaintiff would not be eligible for unsupervised privileges. Baptist provided her with a copy of the bylaws, which she then signed, signifying her agreement to be bound by then in her dealings with the hospital. At the time plaintiff voiced no dissatisfaction with this arrangement.

Plaintiff's dissatisfaction with the level of her privileges arose only after Health First continued to deny her request for membership. It was only then that she revealed her true purpose in seeking privileges; and it is only since filing her complaint that plaintiff claims not to have received all the privileges for which she originally asked. Plaintiff will not now be heard to argue that Baptist's compliance with plaintiff's

actual, written request is somehow evidence of an antitrust conspiracy.

Plaintiff next challenges the interaction between the exclusive contract with Radiology Associates and the bylaws practice requirement. Prior to June 1985, Baptist's contract with Radiology Associates was oral, and its terms were rather vaguely defined. In the summer of 1984, several months preceding plaintiff's first application for privileges, Baptist's Board of Directors ordered the administrative staff to negotiate a written contract.

Although the contract was not oed until June 28, 1985, Baptist represented to plaintiff that it was bound by its negotiations, and therefore could not process her application. When the hospital later reached an accommodation with plaintiff, it explained, as described above, that the contract, together with the bylaws practice requirement, would prevent it from granting her unsupervised privileges.

Plaintiff now attacks the exclusive contract on the grounds that the switch from a vaguely defined oral contract to a written contract "unnecessarily tied Baptist's hands." In other words, it prevented the hospital from accommodating plaintiff on her terms. The switch, according to plaintiff, was therefore economically irrational, and is evidence of an antitrust conspiracy.

This is essentially an attack on the economic validity of the exclusive contract, and I reject it out of hand. I already have discussed this issue in connection with the PRC contract, and it is settled law that the mere existence of an exclusive contract is not evidence of an antitrust conspiracy.

Plaintiff counters that Baptist decided to put its 35-year-old oral contract into writing precisely as she was applying for privileges, which implies an improper motive. However, the evidence is undisputed that negotiations on the written contract began several months before plaintiff submitted her application to any of the defendants in this case. Except for the actual coincidence of her application and the contract negotiations, there is absolutely nothing in the record to refute Baptist's evidence that the hospital was in the process of converting all their preexisting oral contracts into writing, and that the radiology contract was simply the next in line for conversion. Given that Baptist's explanation is consistent with permissible, unilateral business activity, I cannot conclude that the mere drafting of a contract at about the same time plaintiff submitted her application is evidence of anything.

Plaintiff also argues that, because the privileges requirement in the bylaws was not objectively necessary to assure quality medical care, Baptist's reliance on it to deny her unsupervised privileges is circumstantial evidence of an antitrust conspiracy between it and Radiology Associates. Again, this argument is, at best, specious. The bylaws existed long before plaintiff submitted her application. Nor is there any evidence that they were changed.

Plaintiff argues that, because the requirement prevents her from obtaining unsupervised privileges, it is irrational. Obviously, that is not the test. No requirement can satisfy every applicant. The test is whether the requirement is objectively economically reasonable in light of Baptist's legitimate business objectives. The answer, of course, is yes.

Plaintiff argues in the alternative that while the privileges requirement may be objectively rational, Baptist acted irrationally by refusing to waive the requirement for plaintiff. In other words, plaintiff argues that Baptist's failure to modify the privileges requirement is pretextual.

My previous analysis of this argument in connection with the alleged conspiracy between Sacred Heart and PRC applies with equal force here, and needs no repeating. There is simply no material evidence of pretext. Suffice it to say that, even if Baptist's reliance on the privileges requirement was pretextual, such pretext would constitute unilateral action by Baptist. *Todorov v. DCH Healthcare Authority*, *supra*, 921 F.2d 1438, 1459 (11th Cir. 1991). Therefore, it is not evidence of a conspiracy between Baptist and Radiology Associates.

The same may be said for the contracts between Baptist and Drs. Westafer, French, and Montgomery. The Baptist situation is even stronger than with Sacred Heart, because the Baptist contracts contain a clause specifically stating that the loan in no way obligates the physician to refer patients to Baptist, and that referrals are to be made according to the best medical interests of the patient. Additionally, there is absolutely no evidence that anyone from Baptist or Radiology Associates pressured Drs. Westafer, French, or Montgomery into diverting referrals away from plaintiff and to Baptist.

Nevertheless, plaintiff makes the astounding argument that the mere lack of growth in referrals from these physicians is evidence of a conspiracy. Plaintiff does not even contend that she ever had a referral base at Baptist, or with these doctors, which was eroded by Baptist's action. Rather, she points to the growth in referrals from Dr. Epps, a Baptist

physician not encumbered by a loan agreement, and concludes that referrals from Drs. Westafer, French, and Montgomery would have grown if they had not been parties to the offending contracts.

This comparison is meaningless. As discussed earlier, the Supreme Court has expressly held that conduct that is as consistent with permissible, unilateral activity as with an illegal conspiracy does not, standing alone, permit the inference of an antitrust conspiracy. There are numerous rational explanations for the disparate growth in referrals from these four physicians. Location, patient preference, and physician preference are just a few that come to mind. Under the facts of this case, each of these explanations is just as likely as plaintiff's explanation - - - if not more so. Therefore, plaintiff's contrived speculation cannot support the inference of an antitrust conspiracy.

Plaintiff herself argues that the possibility of increased referrals from her clinic provided an economic incentive for the hospital defendants to grant her requests for privileges. She does not explain why a similar, rational business-motivated exchange of benefits between Baptist and Drs. Westafer, French, and Montgomery should be subject to antitrust liability. In short, the mere referral of patients to a hospital that has loaned the referring physician money to open a practice is at least as consistent with legitimate unilateral activity as with illegal concerted activity.

I make one more observation regarding Baptist's relation with plaintiff. As with Sacred Heart, Baptist and plaintiff are direct competitors. Plaintiff's own statistics reveal that as of 1989, the market for services encompassed by plaintiff's

specialty was split almost equally among Baptist, Sacred Heart (Ann Baroco Center), and Pensacola Diagnostic.[42] All appear to be competing with each other for patients. Thus, Baptist would have a rational economic motive to refrain from granting plaintiff's request for privileges.

Plaintiff has argued that Baptist (or Sacred Heart) would realize an economic gain from establishing a relationship with her because she often must refer patients to hospitals for surgery. Yet, it is undisputed that she has never admitted a patient to any hospital at which she has privileges. Since attaining privileges at Baptist, she has visited only three patients there. In only one of these cases was Dr. Williamson acting as the "primary care" physician. And, even then, it was the surgeon who admitted the patient. Similarly, at least half of plaintiff's patients are referred to her by traditional primary care physicians who, if further treatment was indicated, would dictate the choice of hospital. Regardless, it is undisputed that, as competitors, Baptist had no legal obligation to make special accommodations to aid the plaintiff.

In sum, Baptist's motion for summary judgment is GRANTED insofar as it pertains to the alleged conspiracy between Baptist, Radiology Associates, and unnamed others to prevent plaintiff from competing for radiology patients.

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[42] These figures in the record are based on revenues from procedures encompassed by plaintiff's specialty and were compiled by plaintiff's expert. The data omits figures for the privatelyowned West Florida Regional Medical Center, an H.C.A. hospital, which is the major competitor of both Sacred Heart and Baptist, as well as the two other Pensacola hospitals, Navy and (at that time) University.

3. The Community Conspiracy

In Count III of her complaint, plaintiff alleges that there was a "community wide" conspiracy among all the defendants to prevent her from gaining membership in Health First. This effectively disqualified her from treating HOP subscribers, and thereby prevented her from competing for patients in need of radiology services. The evidence in support of this conspiracy consists of the parallel refusals of the defendants to accommodate plaintiff's practice. According to plaintiff, Health First's denial of her application for membership was economically irrational unless all the defendants "toed the line" by refusing to accommodate her.

The rule in this circuit is that evidence of conscious parallelism does not permit an inference of conspiracy unless the plaintiff establishes that each defendant engaging in the parallel action acted contrary to its economic self-interest. *Bolt v. Halifax Hospital Medical Center, supra*, 891 F.2d 810, 826 (11th Cir. 1990). "Thus, the plaintiff must establish that each defendant would have acted unreasonably in a business sense if it had engaged in the challenged conduct unless that defendant had received assurances from the other defendants that they would take the same action." *Id.* at 826-27.

I already have determined that the evidence in this case does not tend to exclude the possibility that both Sacred Heart and Baptist acted independently and in a manner consistent with rational business objectives in denying plaintiff's applications for privileges. Accordingly, plaintiff's claim of conscious parallelism cannot support an inference of conspiracy.

It is important to note here that, aside from the parallel denials of staff privileges (or membership in the case of Health First), there is no evidence that the defendants conspired to deprive her of membership in Health First. It is true that the physicians serving on Health First's Board of Directors were affiliated in one way or another with either Baptist or Sacred Heart. However, the mere opportunity to conspire among antitrust defendants is insufficient to permit the inference of conspiracy. *Bolt, supra*, 891 F.2d at 827.

There are other factors at work in the marketplace. By their very nature, HMOs restrict competition. As described above, Health First's bylaws initially required applicants to have privileges at a "participating hospital". At the time, the only such hospitals were Sacred Heart and Baptist. Health First maintains that it adopted this "ready made" credentialling procedure to avoid the cost of hiring a staff to screen applicants, and there is no evidence to the contrary.

The efficiency of this arrangement notwithstanding, it is clear that it effectively forfeits control over the selection of both physician participants and practice formats to the participating hospitals. Sacred Heart and Baptist therefore had de facto control over Health First's membership. Obviously, physicians who are otherwise competent in their specialties may be excluded from the HOP patient pool simply because they do not have privileges at one of these two hospitals.

In late 1985, shortly after becoming operational, HOP decided to begin admitting hospitals located outside the Pensacola area. To accommodate physicians who practiced at these hospitals, Health First amended its bylaws to provide that physicians who practiced primarily outside the greater Pensacola

area could become members of Health First by obtaining privileges at one of the outlying hospitals. At the same time it retained the requirement that physicians practicing primarily within Pensacola must have privileges at Baptist or Sacred Heart.[43]

It is clear that the amended bylaws allowed Sacred Heart and Baptist to retain effective control over Health First membership within the greater Pensacola area. In order to fully understand the nature of this control, one must look to the nature of the competition between doctor owned, for-profit hospitals and nonprofit hospitals like Baptist and Sacred Heart within the greater Pensacola market.

As the record shows, Baptist and Sacred Heart compete neck and neck with the privately owned West Florida Regional Hospital. In 1984, the Medical Center Clinic at West Florida Regional created its own HMO. In order to compete, Baptist and Sacred Heart created HOP. Obviously, if Health First was to compete successfully, it could not open its membership to physicians associated with West Florida Regional, and vice versa. Viewed in this context, the procompetitive aspects of Health First's credentialling criteria become apparent.

As can be seen, competition between HMOs creates something of a paradox. on one level,, their restrictive practices

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[43] Plaintiff's claim that the 1985 amendments were adopted for the specific purpose of excluding her from membership is without merit. Plaintiff did not obtain privileges at any of the outlying hospitals until 1987. Unless Health First's Board members could foretell the future, they would have no way of knowing that their actions would impact any particular individual. Additionally, I note that plaintiff was ineligible under both the original and amended version of the bylaws.

promote competition. On another level, they have an obvious anticompetitive effect. Thus, the question becomes whether the procompetitive benefits offset the anticompetitive effect in the relevant product and geographic markets (the "rule of reason"). *Seagood Trading Corp. v. Jerrico, Inc., supra,* 924 F.2d 1555, 1569 (11th Cir. 1991) (citations omitted); *Construction Aggregate Transport, Inc. v. Florida Rock Indus., Inc.*, 710 F.2d 752, 771-72 (11th Cir. 1983).[44]

For the purposes of the rule of reason analysis, there does not appear to be any evidence that the relevant geographic market is other than the greater Pensacola area. This includes Pensacola proper, along with the surrounding cities of Cantonment, Gulf Breeze, and Milton.[45] Similarly, there is no real dispute over the definition of the product component of the relevant market. It is the use of outpatient diagnostic radiology in the detection and treatment of breast cancer.[46] In this case, consumers are generally limited in their choice of physicians by the type of insurance they carry.

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[44] I emphasize that I am not dealing here with the conspiracy alleged by plaintiff. I already have determined that there was no conspiracy. Rather, I an looking at the fundamental structure of the HMO itself.

[45] Defendants merely assert that plaintiff has failed to present evidence establishing the relevant geographic market. It is undisputed that over 80% of Health Options subscribers live within the greater Pensacola area. In addition, over 50% of Baptist's and Sacred Heart's patients reside in this geographic area.

[46] As discussed above, the product dimension of the relevant market is "determined by the availability of substitutes to which consumers can turn in response to price increases and other existing or potential producer's abiliby to expand output." *L.A. Draper, supra,* 735 F.2d at 423.

Although HOP met with some measure of success, the health insurance market in the greater Pensacola area has been, and remains, highly fragmented. At the time Dr. Williamson filed her complaint, two HMOS, in addition to HOP, operated within the market. They were Medical Center Health Plan ("MCHP") and Metlife Healthcare Network of Florida ("Metlife") (formerly HMO America). At their peaks, which came around 1988, MCHP, Metlife, and HOP had enrollments of approximately 31,000, 7,000, and 23,000 respectively. From this peak, HOP membership gradually declined to approximately 15,000.00 in June of 1989. Enrollment in the other two HMOs declined similarly. As of April 1990, HOP still had approximately 15,000 members, MCHP also had about 15,000 members, while Metlife had declined to roughly 3,000 members.

In addition to the three HMOS, there are at least eight other providers of group health insurance operating in the greater Pensacola area. These include Blue Cross/Blue Shield of Florida PPC, Met-Elect PPO, and American General PPO. All of these are preferred provider programs ("PPOs").[47] There are also three government funded programs: Champus, Medicare, and Medicaid. Finally, there are commercial indemnity insurance companies that supply group health insurance; Aetna and Providence are the largest in the Pensacola area.

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[47] In a PPO, members are permitted to choose any physician or treatment facility they please. The insurer then reimburses the provider for a fixed amount per service or for a fixed percentage of the fee for the service. The provider then bills the subscriber for any outstanding balance. Many PPOs also have a deductible that the subscriber must pay out of his own pocket before he is eligible for reimbursement.

Together with the three HMOs, these entities service almost the entire group health insurance market in the greater Pensacola area. This market consists of over 300,000 people. Thus, while it controlled between 38% and 45% of the HMO market between 1988 and 1990, HOP controlled only between 5% and 8% of total group health insurance market. Obviously, these percentages would be much lower if the market were expanded to include all people treated by doctors.

Although plaintiff has been excluded from HOP, she has been, and continues to be, a physician provider for Metlife, Blue Cross/Blue Shield PPC, MetElect PPO, American General PPO, Lawrence Health Care Administrative Services, Inc. Champus, and Medicare. Thus, it appears that a maximum of 8% of potential patients are excluded from choosing plaintiff's services. Under these circumstances, it would appear that the procompetitive benefit of allowing consumers the choice of an additional HMO outweighs the anticompetitive effect of the HMO structure.

In addition, it does not appear that HOP's presence has resulted in any detriment to competition in the relevant market. Plaintiff's own figures show that from the fiscal year ending April 30, 1985, to the fiscal year ending April 30, 1990, plaintiff's clinic receipts increased by over 300%, while her income increased in excess of 500%.

Plaintiff argues, of course, that these figures would have been even higher if defendants had not "prevented her from competing". The evidence clearly shows that plaintiff was a highly effective competitor. The injuries she complains of are merely those that every competitor must endure. Given HOP's small share of the total group health insurance market, along

with plaintiff's obvious penetration and successful competition in the market, I must conclude that HOP's restrictive membership does not impose an unreasonable restraint on trade in the relevant geographic and product markets.

In sum, I conclude that defendants' parallel denials of plaintiff's various applications for privileges and staff membership do not support the inference of an antitrust conspiracy among the defendants. Moreover, I conclude that Health First's restrictive admissions practices do not unreasonably restrain trade in the relevant market. Accordingly, Defendants' various motions for summary judgment are GRANTED as to Count III.

E. Tortious Interference

Count IV of plaintiff's complaint alleges that defendants Sacred Heart, PRC, and Dr. Post intentionally and wrongfully interfered with existing and prospective business relationships which plaintiff had with patients at her clinic and with other doctors, and that they further interfered with prospective relationships plaintiff had with HOP patients. Baptist is not named in this count. This is a pendent state law claim.

Tortious interference with business relationships and tortious interference with contractual relations are "basically the same cause of action" under Florida law. *Smith v. Ocean State Bank*, 335 So. 2d 641, 642 (Fla. 1st DCA 1976). "The only material difference appears to be that in one there is a contract and in the other there is only a business relationship." *Id.* In order to prove a tortious interference claim, the plaintiff must demonstrate: (1) the existence of a business or contractual relationship under which the plaintiff had legal rights; (2) an

intentional and unjustified interference with the relationship; and (3) damage to the plaintiff as a result of the tortious interference with that relationship. *Ad-Vantage Telephone Directory Consultants, Inc. v. GTE Directories*, 849 F.2d 1336, 1348-49 (11th Cir. 1987) (applying Florida law); *Tamiami Trail Tours, Inc. v. Cotton*, 463 So. 2d 1125, 1127 (Fla. 1985). The relationship involved can be based on a business expectancy arising "even from an unenforceable agreement which would have been completed had the defendant not intervened." *Scussel v. Balter*, 386 So. 2d 1227, 1228 (Fla. 3d DCA 1980), *citing United Yacht Brokers, Inc. v. Gillespie*, 377 So. 2d 668 (Fla. 1979).

In order to be actionable, the interference must be direct; conduct that has only indirect consequences on the plaintiff will not support a claim for tortious interference. *See Lawler v. Eugene Wuesthoff Memorial Hospital Ass'n*, 497 So. 2d 1261, 1263 (Fla. 5th DCA 1986); *Rosa v. Florida Coast Bank*, 484 So. 2d 57 (Fla. 4th DCA 1986). For instance, in *Lawler, supra*, the plaintiff physician brought a claim for intentional interference with his doctor-doctor and doctor-patient relationships after the defendant hospital terminated staff privileges. The trial court dismissed the claim, and the appellate court affirmed, holding that the claimed interference was "only an indirect consequence of the termination of staff privileges." *Lawler*, 497 So. 2d at 1263. In contrast, the court in *Scheller v. American Medical Int'l, Inc.*, 502 So. 2d 1268 (Fla. 4th DCA), *cert. denied*, 513 So. 2d 1060 (Fla. 1987), held that a physician stated a valid claim for tortious interference where he alleged that the defendant hospital wrongfully denied him access to laboratories and billing information.

Closely related is the rule in Florida that no liability for tortious interference exists where the defendant acted to protect its own legitimate economic interests. *Genet Co. v. Anheuser. Busch, Inc.*, 498 So.2d 683, 664 (Fla. 3d DCA 1986). "So long as improper means are not employed, activities taken to safeguard or promote one's own financial and contractual interests are entirely non-actionable." *Ethyl Corp. v. Balter*, 386 So. 2d 1220, 1224-25 (Fla. 3d DCA 1980) *review denied* 392 So. 2d 1271 (Fla.), *cert denied*, 452 U.S. 955, 101 S. Ct. 3099, 69 L. Ed. 2d 965 (1981).

1. Sacred Heart

Sacred Heart contends that it did not directly interfere with plaintiff's practice, but even if it did interfere directly, it did so for legitimate business reasons. I agree. Sacred Heart correctly points out that, in Florida, no tortious liability interference exists where the defendant acted to protect its own legitimate economic interests. Insofar as plaintiff's claim relates to the needle placement controversy, I already have determined that Sacred Heart's conduct was consistent with the maintenance of quality care, and was in the best interests of its patients. Any effect on plaintiff's practice, therefore, was incidental. Further, there seems to be no reason in the record to require Sacred Heart to change its policy in order to accommodate the plaintiff as a competitor.

The same is true for the contractual agreements between Sacred Heart and various physicians. As previously discussed, the record does not support the plaintiff's allegations regarding referrals. Even assuming that these contracts in fact lead to a decrease in referrals from these doctors, there is nothing to support plaintiff's contention that the interference was

intentional. Each contract promoted Sacred Heart's legitimate business interests, and each physician gained a concomitant business benefit. Any decrease in referrals was incidental, and therefore, not actionable. For these reasons, Sacred Heart's motion for summary judgment on Count IV is GRANTED.

2. PRC and Dr. Post

The only evidence supporting plaintiff's tortious interference claim against Dr. Post and PRC is the fact that Dr. Post tried to convince Dr. Murphy to refer his patients to Sacred Heart's radiology department by appealing to Dr. Murphy's sense of loyalty to the hospital. This conduct simply is not tortious. Competitors have a right to attract patronage by lobbying potential customers for their business. That is the essence of competition. Such conduct becomes actionable only when the competitor uses improper means. *See, e.g., Ad-Vantage Telephone, supra*, 849 F.2d at 1348-49 (defendant contacted customers of plaintiff, improperly imposing additional burdens on them if they continued to deal with plaintiff; *Manufacturing Research Corp. v. Greenlee Tool Co.*, 693 F.2d 1037 (11th Cir. 1982) (defendant contacted customers and employees of plaintiff with false information, which constituted direct interference); *Insurance Field Servs. Inc. v. White & White Inspection & Audit Serv., Inc.*, 384 So. 2d 303 (Fla. 5th DCA 1980) (direct tortious interference found where defendants contacted plaintiff's customers to solicit their business in a wrongful manner).

In this case there is no evidence that Dr. Post did anything but talk to Dr. Murphy. There is also no evidence that PRC or Dr. Post had any ability to affect Dr. Murphy's practice. Finally, Dr. Murphy himself testified that Dr. Post's

efforts were unsuccessful and that he continued to refer patients to plaintiff. Accordingly, the motion of Dr. Post and PRC for summary judgment on plaintiff's tortious interference claim is GRANTED.

3. Dismissal of State Law Claims

In the alternative, I also conclude that the state law claims against these defendants should be, and are DISMISSED, without prejudice, in the absence of any viable federal claims and as a matter of comity. *See United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726, 86 S. Ct. 1130, 16 L.Ed. 2d 218, 228 (1966).

III. CONCLUSION

In sum, I conclude that, after a thorough review of the voluminous evidentiary record, there are no genuine issues of material fact remaining in this case and that the defendants are entitled to summary judgment on all claims. The defendants' motions are GRANTED, and the Clerk shall enter judgment in their favor and against the plaintiff on all claims, together with taxable costs.

DONE AND ORDERED this 28th day of May, 1993.

ROGER VINSON
United States District Judge

TPA2-262088

No. 94-1707

Supreme Court, U.S.
FILED
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ANGEL YUH WILLIAMSON, M.D., and
PENSACOLA DIAGNOSTIC CENTER & BREAST CLINIC, P.A.,
Petitioners,

v.

SACRED HEART HOSPITAL OF PENSACOLA, BAPTIST HOSPITAL, INC., PENSACOLA RADIOLOGY CONSULTANTS, P.A., ALBERT A. POST, M.D., KEITH T. SHEARLOCK, M.D., and HEALTH FIRST NETWORK, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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QUESTIONS PRESENTED

I. Whether a plaintiff, who has presented no evidence of antitrust injury, has standing to sue under the antitrust laws?

II. In determining whether a plaintiff's antitrust claim should survive summary judgment, may the court determine the economic reasonableness of plaintiff's theory?

INTERESTED PERSONS

The following persons and entities have or may have an interest in the outcome of this case.

1. Baptist Hospital, Inc.
   (Respondent)

2. Beggs & Lane
   W. Spencer Mitchem, Esq.
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   Keith T. Shearlock, M.D.)

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7. Health First Network, Inc.
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    (Petitioner)

12. Pensacola Radiology Consultants, P.A.
    (Respondent)

13. Albert A. Post, M.D.
    (Respondent)

14. Sacred Heart Hospital of Pensacola
    (Respondent)

15. Keith T. Shearlock, M.D.
    (Respondent)

16. Angel Yuh Williamson, M.D.
    (Petitioner)

17. Michael Williamson, M.D.
    (spouse of Angel Yuh Williamson)

STATEMENT OF PARENT, SUBSIDIARY AND AFFILIATE CORPORATIONS

Pursuant to Supreme Court Rule 29.1, the following information is provided regarding parent, subsidiary and affiliate corporations of each of the Respondents that are incorporated.

1. Sacred Heart Hospital of Pensacola

   a. Daughters of Charity National Health System, Southeast, Inc. is the parent company of Sacred Heart Hospital of Pensacola.

   b. Sacred Heart has two subsidiaries: Sacred Heart Foundation, Inc. and Gulf Coast Diversified, Inc., both of which are wholly-owned subsidiaries of Sacred Heart Hospital of Pensacola.

2. Baptist Hospital, Inc.

   Baptist Healthcare, Inc. is the parent company of Baptist Hospital, Inc.

3. Healthcare First Network, Inc. has no parent, subsidiary, or affiliate corporation.

4. Pensacola Radiology Consultants, P.A. has no parent, subsidiary, or affiliate corporations.

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RULE

Sup. Ct. R. 10 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1707

ANGEL YUH WILLIAMSON, M.D., and
PENSACOLA DIAGNOSTIC CENTER & BREAST CLINIC, P.A.,
Petitioners,

v.

SACRED HEART HOSPITAL OF PENSACOLA, BAPTIST HOSPITAL, INC., PENSACOLA RADIOLOGY CONSULTANTS, P.A., ALBERT A. POST, M.D., KEITH T. SHEARLOCK, M.D., and HEALTH FIRST NETWORK, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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RESPONDENTS' JOINT BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents, Sacred Heart Hospital of Pensacola ("Sacred Heart"), Baptist Hospital, Inc. ("Baptist"), Pensacola Radiology Consultants, P.A. ("PRC"), Albert A. Post, M.D., Keith T. Shearlock, M.D., and Health First Network, Inc. ("Health First") (collectively, the "Respondents"), submit this joint brief in opposition to the petition for a writ of certiorari. Respondents file this joint brief to facilitate the Court's consideration of the matter and because common legal issues are posed.

STATEMENT OF THE CASE

I. Proceedings Below

This action was commenced on March 29, 1989, when Petitioners, Angel Williamson and Pensacola Diagnostic Center & Breast Clinic, P.A. (hereinafter "Williamson," the "Clinic," or "Petitioner"),[1] filed a four-count complaint against Respondents alleging federal antitrust violations and state law claims (the "Complaint"). The gravamen of the Complaint is that the Respondents—consisting of two hospitals, an independent physician's association ("IPA"), a radiology group, and various doctors—conspired to prevent Williamson and the Clinic from competing in providing radiology services by the use of exclusive contracts, the denial or limitation of staff privileges, and the alleged manipulation of bylaws, rules and regulations. Williamson claims that as a result of this alleged conspiracy, her application for membership in Health First, the IPA, was denied. (R1-2.) In addition, Petitioner alleges that she suffered antitrust injury by an unreasonable restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, as alleged in Counts I, II and III of the Complaint.

After extensive discovery, Respondents moved for summary judgment. The district court's first order, denying the motions for summary judgment of Baptist, Sacred Heart, Health First, and Keith T. Shearlock, M.D., was the result of several inaccurate factual findings, which led the court to erroneous legal conclusions. The factual errors were caused by inaccuracies, misrepresentations, and improper materials in Petitioner's papers.[2] When the errors were made known to the district court, the first

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[1] Because Williamson is the sole owner of the Clinic, they are treated as one Petitioner for the purposes of this brief.

[2] For example, Petitioner relied heavily on affidavits by experts who were never previously identified as required by the federal discovery rules, as well as by the district court's own scheduling order.

order was reconsidered and summary judgment was granted in favor of all Respondents on all counts.

Petitioner then appealed that dismissal to the Court of Appeals for the Eleventh Circuit, reciting the same unsupported claims of conspiracy. After a *de novo* review, the Eleventh Circuit affirmed the district court's granting of summary judgment. The Eleventh Circuit subsequently denied Petitioner's request for rehearing.

The Eleventh Circuit's opinion affirming summary judgment cogently discussed each count of the Complaint, analyzing the Respondents' conduct taken as a whole under the claim of community conspiracy (Count III), and individually under separate conspiracy claims. (Counts I and II.)

II. Statement of the Facts

A. *Sacred Heart*

Williamson alleges that the Respondents' conspiracy to eliminate her practice was accomplished by a two-pronged attack on her referral base, namely, the denial of medical staff privileges at Sacred Heart Hospital, which allegedly prevented Williamson from rendering complete care to her patients, and the alleged attack on her physician referral base. With regard to the denial of staff privileges, it is clear that the exclusive contract between Sacred Heart and PRC precluded the grant of privileges to Williamson in the Department of Radiology. Further, Sacred Heart had no economic incentive to "accommodate" Williamson by granting her privileges, inasmuch as the Hospital was committed to opening the Ann Baroco Center, which would be in direct competition with Williamson's clinic. As the district court and the Eleventh Circuit noted, the failure to make special exceptions to established policy to accommodate a competitor is not antitrust behavior. (A135-136; A8.)[3]

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[3] Citations to the Appendix filed by Petitioners are designated as "A ——."

While Williamson contends that Sacred Heart would gain economically from a relationship with her, due to the referral of patients she would provide to the Hospital, the record is undisputed that she neither admitted patients nor provided tangible treatment to patients during "follow-up" visits at other hospitals where she had medical staff membership. (R11-302, App. 1, Tab 3, pp. 1096-1100; A12.)

Williamson contends that Sacred Heart amended its Department of Internal Medicine Rules in an attempt to block her admission to the medical staff. However, the process to amend the rules at issue commenced well before she submitted her first application for staff membership. Further, even under its old bylaws, the Credentialing Committee and the Medical Executive Committee determined she did not meet the minimum requirements for privileges in the Department of Internal Medicine. (R11-302, Whitcomb Affidavit, Exhibit "A", Tab 3.) Williamson's statement that she had the requisite training to satisfy the minimal requirements for privileges in internal medicine is patently false. She unequivocally admitted at the ad hoc hearing that she had not completed one year of clinical training in primary care, the minimum eligibility requirement for privileges. (R11-302, Whitcomb Affidavit, Exhibit "A", Tab 16, pp. 24-34; A84.)

There is absolutely no evidence in the record that any physician associated with PRC played any role in the processing of Williamson's applications. The ultimate credentialing decisions by the Hospital's Board of Directors constituted unilateral actions taken by Sacred Heart's Board of Directors, and do not support a theory of antitrust conspiracy or pretext. (A8-9; A69-70; A137.) Contrary to Williamson's contentions, there is no evidence in the record that Sacred Heart pressured any physicians not to refer patients to Williamson. As noted by the district court, Williamson's allegations of threat and pressure are based almost entirely on her own hearsay testi-

mony describing what other physicians allegedly told her about what Sacred Heart administrators, in turn, told them. (A138.) All physicians who were deposed denied that they were under any pressure to disassociate themselves from Williamson. (A93-100.) Further, contrary to the interferences in the Petition, there is evidence in the record that referrals to Williamson from certain physicians actually increased during the relevant period, and that certain physicians always referred their patients to Williamson. (A96-97.)

Petitioner goes on to assert that Sacred Heart entered into contracts with physicians which required a diversion of referrals. All of the physicians who were parties to these contracts denied that the contracts created any requirement for them to refer patients to Sacred Heart's Radiology Department, or that they were under any pressure to make such referrals. (*See, e.g.*, R11-302, App. II, Tabs 36, 38, 40, 42, 43, 47; A142). Moreover, there is no admissible evidence that PRC or any radiologist encouraged Sacred Heart to enter into the contracts, or urged Sacred Heart to request radiology referrals from the contracting physicians. (A148.)

Williamson also contends that Sacred Heart adopted a "needle placement" policy in furtherance of an alleged conspiracy. However, the record makes it clear that there were numerous quality assurance concerns which were raised regarding this particular procedure which unnecessarily exposed Sacred Heart to civil liability. (R11-302, App. II, Tabs 48, 53.) As both the district court and the court of appeals decisions recognized, there existed a compelling, procompetitive reason for banning the procedure proposed by Williamson: she was outside the scope of Sacred Heart's quality controls. (A10; A146-147.) Thus, Sacred Heart had a legitimate reason for implementing the needle placement policy, and no inference of antitrust conspiracy has been raised. (A10.)

B. *Baptist*

The critical and undisputed fact with respect to Baptist is that Baptist granted the privileges that Williamson requested. Accordingly, Petitioner's contention that "Dr. Williamson proved the conspiracy below by showing that the defendants undertook parallel actions that made no economic sense in the absence of conspiracy" is wrong. (Petition of Angel Yuh Williamson, M.D. and Pensacola Diagnostic and Breast Clinic, P.A. for Writ of Certiorari (the "Petition") at 10.) Williamson admitted, and the courts below so found, that Baptist granted her the privileges to do what she wanted to do at Baptist. Thus, Baptist's action in granting privileges was different from and independent of Sacred Heart's actions and, therefore, was not evidence of parallel conduct. (R15-354-102.)

Nor is the fact that Baptist granted Williamson supervised privileges, rather than unsupervised privileges, of any moment. As noted above, Williamson was granted the privileges for what she wanted to do at Baptist. Moreover, Baptist explained to her that the interaction of its bylaws requirements and its exclusive contract for radiological services with Radiology Associates [4] would not allow the granting of unsupervised privileges. The Eleventh Circuit found no pretext in such an explanation since Baptist's bylaws predated Williamson's application and because of the express legality of such exclusive contracts.[5] (A11.)

Likewise, with respect to the so-called "attack on referrals," the Eleventh Circuit found that the contracts between Baptist and three other doctors, which Petitioner

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[4] Radiology Associates is not a party to this action, nor has it ever been affiliated with PRC.

[5] Exclusive contracts such as the one between Baptist and Radiology Associates were found to be valid by this Court in *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984). Accordingly, in the summer of 1984, the Board of Directors of Baptist directed its administration and staff to reduce its long-standing relationship with Radiology Associates to an exclusive written contract. (R10-291, Exhibit "C".)

contended deprived Williamson of referrals, could not be an attack on referrals since the contracts themselves expressly stated that the doctors were not obligated to refer patients to Baptist. (A11.) Moreover, the courts below further found no evidence that anyone from Baptist or Radiology Associates pressured a diversion of referrals away from Williamson and to Baptist. *Id.*

C. *Health First and Keith T. Shearlock, M.D.*

Petitioner argues that the refusal of Health First to admit Petitioner to membership made no economic sense. Petitioner does not, however, provide an explanation of the reason that Petitioner's application was not accepted.

Petitioner was denied admission to Health First because she did not qualify under the credentialing bylaws and for no other reason. The Health First credentialing bylaw required that physicians such as Williamson, practicing in the Pensacola, Florida, metropolitan area, have unsupervised privileges at one of the participating hospitals in Pensacola—Sacred Heart Hospital or Baptist Hospital. (R10-297-03, pp. 6-7.) The bylaw existed before Williamson ever applied for admission to Health First. (R10-297-26, p. 106.) The bylaw was not adopted or changed to affect Petitioner. Petitioner has never qualified for admission to Health First.

The requirement of unsupervised privileges in its credentialing bylaw enabled Health First, which had no staff of its own, to take advantage of the hospital's credentialing and oversight process. (R10-297-1, pp. 2-3.) An additional purpose of the bylaw was to assure that HMO subscribers in the Pensacola service area and their HMO physicians had access to convenient, local hospital care by physicians known to be competent. (R10-297-26, pp. 34, 38-39.)

Petitioner argues that Health First "did everything it could to keep her out." (Petition at 19.) The fact is

that Health First simply abided by its existing bylaw. Petitioner's argument below was that Health First should have made an accommodation by amending its bylaws to make special provision for her. This would have required Health First similarly to accommodate all applicants, or would have required Health First to abandon its reliance on the hospital's credentialing process and to incur the cost of setting up its own independent criteria for investigation, evaluation, and supervision of each medical specialty.

HMOs, by their very nature, are somewhat exclusive. Every physician is not entitled to be included in every HMO. The various plans enhance competition because they offer a choice between groups of hospitals and physicians from which consumers can choose.

Petitioner's contention that Health First acted against its own self-interest in denying Petitioner membership is simply wrong. It made plain economic sense for Health First to adhere to its bylaws, and to follow its efficient credentialing procedure.

The district court found that Health First adopted its "ready made" credentialing procedure to avoid the cost of hiring a staff to screen applications. (A157.) The Eleventh Circuit, on *de novo* review, found that Health First adopted its credentialing process to avoid costs; a "legitimate business decision." (A13.) Both courts found no evidence of a conspiracy to keep Petitioner out of Health First (A13; A157), and both courts correctly found that Health First's admissions requirements did not unreasonably restrain trade. (A13; A162.)

D. *PRC and Albert A. Post, M.D.*

Since 1975, PRC has provided radiological services to Sacred Heart pursuant to an exclusive written contract. PRC and Dr. Post, as Chairman of the Department of Radiology, were joined as defendants in this lawsuit

solely because of that exclusive contract. Petitioner claims she was denied staff privileges at Sacred Heart because of a conspiracy which included PRC and Dr. Post. The sole involvement of PRC and Dr. Post was to question how the Petitioner could have privileges in the Department of Radiology in light of the exclusive contract. (A137.) Petitioner has not challenged, and cannot challenge the validity of the exclusive contract. (A7; A127.) The record in this case shows there have been no actions taken by PRC and Dr. Post which affected the Petitioner's application for staff privileges at Sacred Heart. The district court and the court of appeals were correct in concluding that the ultimate credentialing decisions constituted unilateral actions taken by the Sacred Heart Board of Directors, and that such actions did not support a theory of antitrust conspiracy. (A9; A137.)

As to the alleged "community-wide" conspiracy, PRC and Dr. Post had no involvement with any decisions made by Health First. Petitioner makes the naked allegation of such a conspiracy without being able to point to any support in the record for her position. After a *de novo* review of the entire record, the Eleventh Circuit correctly agreed with the district court in finding there was "no evidence" that any of the Respondents conspired to keep Petitioner out of Health First. (A13.)

Petitioner claims she proved her community-wide conspiracy by showing the Respondents undertook parallel actions that made no economic sense. However, Petitioner failed to point out any actions taken by PRC or Dr. Post which failed to make economic sense. They engaged in no actions relaing to Health First. As to medical staff privileges at Sacred Heart, their only participation was limited to comments questioning whether it was appropriate to grant Petitioner privileges in the Department of Radiology in light of the exclusive contract. Entering into and upholding the valid exclusive contract

for radiological services was completely consistent with rational economic objectives. (A127.)

E. *The Alleged "Community Wide" Conspiracy*

The courts below also examined the realities of the marketplace in Pensacola and found that, aside from Petitioner's claim of parallel denials of staff privileges (a claim that is insupportable since Baptist, unlike Sacred Heart, granted Williamson privileges), there was no evidence of an antitrust conspiracy to deprive Williamson of membership in Health First. Finding that, even without Williamson's inclusion in Health First, only a maximum of eight percent of potential patients in the Pensacola marketplace were excluded from choosing her services, both the district court and the Eleventh Circuit properly held that there was no antitrust injury.

SUMMARY OF THE ARGUMENT

The petition for a writ of certiorari, as well as the case from which it ensues, is the very embodiment of the warning that this Court has given in antitrust actions brought by competitors. Specifically, in *Spectrum Sports, Inc. v. McQuillan*, 113 S. Ct. 884, 891-92 (1993), this Court stated:

> The purpose of the [Sherman Act] is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns but out of concern for the public interest . . . .

Petitioner, Angel Williamson, operates an extremely successful outpatient radiology clinic in Pensacola, Florida. Notwithstanding the substantial success of the Clinic, Petitioner brought an antitrust action against a number of competitors, chiefly alleging an antitrust conspiracy.

The Eleventh Circuit fully considered and correctly decided Petitioner's claims. At the outset, the Eleventh Circuit found that Petitioner had no standing to sue under the Sherman Act. Petitioner misleadingly and erroneously states that the court below based this finding on evidence that the Clinic had been profitable. (Petition at 24-26.) Contrary to this contention, however, the Eleventh Circuit decided Petitioner's lack of standing to sue based on the fact that Petitioner presented no evidence that the challenged conduct adversely affected competition in the form of higher prices or lower output. This finding does not, as Petitioner would lead this Court to believe, amount to requiring plaintiffs to be "bankrupt to successfully sue under the antitrust laws." (Petition at 26.) Instead, it is consistent with this Court's opinion in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977), in which the Court defined "antitrust injury" (the first requirement of standing) as "reflect[ing] the anticompetitive effect either of the violation or of the anticompetitive acts made possible by the violation." The Eleventh Circuit correctly found that "[b]ecause there has been no harm to competition, there has been no antitrust injury, and consequently appellant lacks standing." (A7.)

The Eleventh Circuit then noted that even if Petitioner had standing to sue, Petitioner's conspiracy theory could not be reasonably supported by the evidence, and that, as a result, Petitioner had failed to raise a genuine issue of material fact to defeat Respondents' motions for summary judgment. The Eleventh Circuit did not, as Petitioner contends, "weigh competing evidence of defendants' motives." Instead, the Eleventh Circuit analyzed the factual context of Petitioner's claim to determine if it made "economic sense" as required under *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). In so doing, the district court and the court of appeals found the undisputed fact that Williamson had never admitted patients to the other hospitals at

wnich she had privileges. Therefore, the Eleventh Circuit reasoned that Petitioner's theory—that, absent a conspiracy, Respondents had an economic incentive to grant her such privileges because she would admit patients—necessarily failed. The undisputed evidence that Petitioner had never admitted a patient to another hospital conclusively negated Petitioner's only inference of conspiracy. There was no factual support for Petitioner's claim of conspiracy whatsoever, let alone any "competing evidence" to be weighed. The Eleventh Circuit, in affirming Respondents' motions for summary judgment, correctly followed the parameters outlined by this Court in *Matsushita*.

When viewed in light of the record and the decision below, it is evident that this case is specific to these particular facts and presents no conflict with other decisions, and no significant legal issues or other "special and important reasons" for granting a writ of certiorari. Sup. Ct. R. 10. Accordingly, the Petition should be denied.

ARGUMENT—REASONS FOR DENYING CERTIORARI

I. THE ELEVENTH CIRCUIT CORRECTLY FOUND THAT PETITIONER HAD NO STANDING TO SUE

The decision below affirming the grant of summary judgment did not turn on the resolution of any significant legal questions. Rather, the court of appeals carefully reviewed the routine issues of standing and the proper standard on a motion for summary judgment. The Eleventh Circuit's review was *de novo*, hence the court below made a thorough review of the facts and law in this case. First, the court of appeals addressed the question of Petitioner's standing. As the Eleventh Circuit correctly stated, standing to sue under the Sherman and Clayton Acts is a question of law. (A6.) Therefore, a court must determine if the plaintiff suffered antitrust injury. Here, Petitioner has offered no evidence of injury or restraint

of trade to the public detriment. Without these requisite elements, Petitioner's claim fails as a matter of law. Far from adequately explaining the argument, Petitioner baldly asserts that the court of appeals wrongly found that she had no standing to sue "because her clinic increased its profits during the course of this litigation." (Petition at 24.) In this regard, Petitioner is misleading, if not completely wrong. In its decision, the Eleventh Circuit stated that to suffer antitrust injury,

> [t]here must be a showing that the plaintiff's injury coincides with public detriment. Generally, this requires either a showing of higher prices or lower output. The record does not indicate a reduction in the output of outpatient radiological services in the Pensacola market.

(A6.)

Petitioner does not even attempt to contradict this finding. Instead, Petitioner argues that Sacret Heart and Baptist also enjoyed an increased share in the market and that she, therefore, should have done even better. This is clearly insufficient to grant standing and certainly not worthy of review by this Court.

II. REVIEW BY THIS COURT IS UNNECESSARY BECAUSE THIS CASE DOES NOT CONFLICT WITH THE STANDARD ENUNCIATED IN *MATSUSHITA ELECTRIC INDUSTRIAL CO. v. ZENITH RADIO CORP.*, NOR WITH ANY OTHER DECISION

Notwithstanding its determination that Petitioner had no standing, the Court below still went on to fully consider Petitioner's claims on the merits. In so doing, the Eleventh Circuit correctly applied this Court's standard as enunciated in *Matsushita*, 475 U.S. 574, for summary judgment in antitrust actions brought by competitors. Petitioner now argues that the Eleventh Circuit impermissibly

weighed competing evidence of Respondents' motives in that once Petitioner submitted evidence supporting a reasonable inference of conspiracy, it was the jury's province to weigh the evidence. Significantly, Petitioner ignores the Eleventh Circuit's critical finding that Petitioner failed to submit any probative evidence supporting an inference of conspiracy in the first instance. Consequently, the court of appeals' decision does not warrant this Court's attention because it was entirely consistent with *Matsushita*. Moreover, it presents no conflicts with other decisions of this Court, or with that of any other court of appeals.

In *Matsushita*, this Court held that to survive a motion for summary judgment, plaintiffs "must establish that there is a genuine issue of material fact as to whether [defendants] entered into an illegal conspiracy that caused [plaintiffs] to suffer a cognizable injury." *Id.* at 585-86 (citing *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968)). This Court went on to state that

> [i]t follows from these settled principles that if the factual context renders [plaintiff's] claims implausible —if the claim makes no economic sense—[plaintiff] must come forward with more persuasive evidence to support their claim than would otherwise be necessary.

Id. at 587.

Moreover, even though inferences to be drawn from the underlying facts must be viewed in a light most favorable to the party opposing the motion, where conduct is "as consistent with permissible competition as with illegal conspiracy [it] does not, standing alone, support an inference of antitrust conspiracy." *Id.* at 588 (citing *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984)). To survive a motion for summary judgment, a plaintiff seeking damages for an antitrust violation "must present evidence 'that tends to exclude the possi-

bility' that the alleged conspirators acted independently." *Id.* (citing *Monsanto*, 465 U.S. at 764). Accordingly, the court below looked to the factual context of this case to determine whether Petitioner's claim, that there was parallel conduct by Respondents amounting to a "refusal to deal," made economic sense.

Significantly, the court below found that there was no parallel conduct in that Baptist, unlike Sacred Heart, granted Petitioner privileges. Not surprisingly, Petitioner fails to even mention this finding that is, in any event, fatal to Petitioner's community-wide conspiracy claim, the self-proclaimed "heart of the complaint." Then, viewing the facts in a light most favorable to Petitioner with respect to parallel conduct, the court below examined whether the alleged parallel "refusals to deal" made economic sense as required under *Matsushita*. In this regard, Petitioner had vigorously argued that Sacred Heart and Baptist had an economic incentive to grant Petitioner privileges in order to capture her hospital admissions patients. Yet, the *undisputed* evidence, found by both the district court and the court of appeals, was that Petitioner had never admitted patients to the hospitals where she already had privileges. Petitioner has not attempted to dispute, nor can she dispute, this critical fact. Consequently, if Petitioner had not admitted patients to hospitals where she already had privileges, the courts below reasoned that there was no economic reason for Sacred Heart or Baptist to grant her privileges. Further, both courts found that Sacred Heart and Baptist were in direct competition with Petitioner for clinic patients and that they had a rational economic reason for denying privileges to her. (A8; A11-12; A129-130; A154-155.)

Petitioner, in her "Questions Presented," characterizes the court of appeals' determination of economic sense as "weigh[ing] competing evidence on the defendants' motives." (Petition at (i).) Yet, this determination of "economic sense" with respect to Petitioner's theory is the pre-

cise teaching of *Matsushita* and its progeny, including the more recent decision of this Court in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 112 S. Ct. 2072 (1992). Although this Court held in *Kodak* that summary judgment should have been denied by the district court, this Court reaffirmed its holding in *Matsushita* by stating, "[i]f the plaintiff's theory is economically senseless, no reasonable jury could find in its favor, and summary judgment should be granted." *Id.* at 2083. Thus, the courts below followed the instructions of this Court and determined that Petitioner's theory made no economic sense. Remarkably, Petitioner does not even argue with the merits of that determination itself, but instead, argues that the district court and court of appeals were wrong to have made the determination in the first place.

Respondents submit that the courts below need not have even reached that determination since it is undisputed that Respondents did not engage in parallel conduct. Having had the benefit of all inferences drawn in her favor to reach this level of analysis, Petitioner now complains it was ever reached at all.

Nor is the decision here in conflict with other circuits as Petitioner suggests. (Petition at 3-4, 17-24.) In each of the three decisions that Petitioner argues are in conflict, the courts of appeals still had to engage in an analysis of the "economic sense" of the plaintiff's claim.[6] In these cases, the particular factual context rendered the defendants' actions reasonable. These cases do not represent a legal conflict, but instead are controlled by distinguishing facts. Indeed, since this Court's holding in

[6] *Petruzzi's IGA Supermarket, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224 (3d Cir.), *cert. denied*, 114 S. Ct. 554 (1993); *Big Apple BMW v. BMW of North America*, 974 F.2d 1358, (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1262 (1993); *Arizona v. Standard Oil of California*, 903 F.2d 432 (9th Cir. 1990), *cert. denied*, 500 U.S. 959 (1991).

Matsushita, federal courts of appeals have affirmed a lower court's grant of summary judgment (or partial summary judgment) for defendants in 35 antitrust cases involving challenges by physicians and other health care practitioners objecting to their exclusion from the staff of a hospital or the panel of a health care plan.[7]

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[7] *Balaklaw v. Lovell*, 14 F.3d 793 (2d Cir. 1994); *Flegel v. Christian Hosp., Northeast-Northwest*, 4 F.3d 682 (8th Cir. 1993); *Capital Imaging Assocs., P.C. v. Mohawk Valley Medical Assocs., Inc.*, 996 F.2d 537 (2d Cir.), *cert. denied*, 114 S. Ct. 388 (1993); *Austin v. McNamara*, 979 F.2d 728 (9th Cir. 1992); *Marrese v. American Academy of Orthopaedic Surgeons*, 977 F.2d 585 (7th Cir. 1992); *Lie v. St. Joseph Hosp.*, 964 F.2d 567 (6th Cir. 1992); *Johnson v. Nyack Hosp.*, 964 F.2d 116 (2d Cir. 1992); *Clough v. Rush*, 959 F.2d 182 (10th Cir. 1992); *Mann v. Princeton Community Hosp. Ass'n.*, 956 F.2d 1162 (4th Cir. 1993); *Coffey v. Healthtrust, Inc.*, 955 F.2d 1388 (10th Cir. 1992), *aff'd*, 1 F.3d 1101 (1993); *Cohn v. Bond*, 953 F.2d 154 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 3057 (1992); *Oksanen v. Page Memorial Hosp.*, 945 F.2d 696 (4th Cir. 1991) (en banc), *cert. denied*, 502 U.S. 1074 (1992); *Bhan v. NME Hosp., Inc.*, 929 F.2d 1404 (9th Cir.), *cert. denied*, 502 U.S. 994 (1991); *Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd.*, 924 F.2d 1484 (9th Cir. 1991); *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438 (11th Cir. 1991); *Beard v. Parkview Hosp.*, 912 F.2d 138 (6th Cir. 1990); *Bolt v. Halifax Hosp. Medical Ctr.*, 891 F.2d 810 (11th Cir.), *cert. denied*, 495 U.S. 924 (1990); *McKenzie v. Mercy Hosp.*, 854 F.2d 365 (10th Cir. 1988); *Sandcrest Outpatient Servs., P.A. v. Cumberland County Hosp. Sys., Inc.*, 853 F.2d 1139 (4th Cir. 1988); *Collins v. Associated Pathologists, Ltd.*, 844 F.2d 473 (7th Cir.), *cert. denied*, 488 U.S. 852 (1988); *White v. Rockingham Radiologists, Ltd.*, 820 F.2d 98 (4th Cir. 1987); *Sarin v. Samaritan Health Ctr.*, 813 F.2d 755 (6th Cir. 1987); *Ezpeleta v. Sisters of Mercy Health Corp.*, 800 F.2d 119 (7th Cir. 1986) (per curiam); *Coastal Neuro-Psychiatric Assocs., v. Onslow Memorial Hosp.*, 795 F.2d 340 (4th Cir. 1986); *Cooper v. Forsyth County Hosp. Auth., Inc.*, 789 F.2d 278 (4th Cir.), *cert. denied*, 479 U.S. 972 (1986); *Goss v. Memorial Hosp. Sys.*, 789 F.2d 353 (5th Cir. 1986); *Miller v. Indiana Hosp.*, 814 F. Supp. 1254 (W.D. Pa.), *aff'd*, 975 F.2d 1550 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1366 (1993); *Brown v. Our Lady of Lourdes Medical Ctr.*, 767 F. Supp. 618 (D.N.J. 1991), *aff'd*, 961 F.2d 207 (3d Cir. 1992); *Westchester Radiological*

Accordingly, the courts below were correct in concluding that Petitioner had not raised a genuine issue of material fact to defeat Respondents' summary judgment motions.

CONCLUSION

For the above reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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